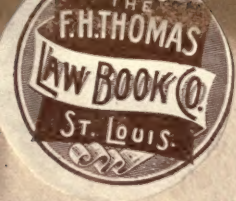


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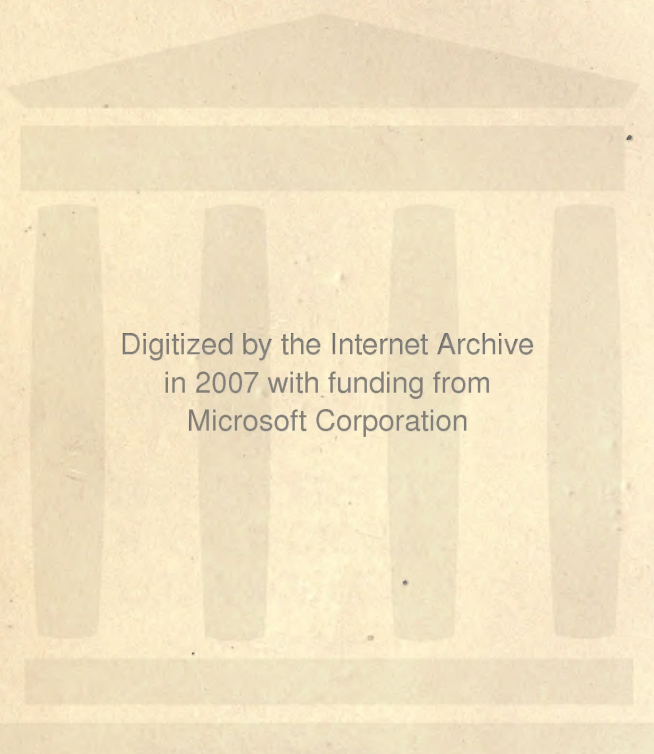
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PRACTICE
PLEADING AND FORMS

ADAPTED TO THE

NEW REVISED CODE OF INDIANA

WITH A FULL CITATION OF ALL THE LATEST ADJUDICATED
CASES IN INDIANA, AND NUMEROUS AUTHORITIES UNDER
THE PRACTICE AT COMMON LAW AND IN EQUITY,
AND UNDER THE CODES OF OTHER STATES

BY
JOHN D. WORKS

VOL. III

FORMS AND NOTES

CINCINNATI
ROBERT CLARKE & CO

1886

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1882

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INDIANA

Practice, Pleading and Forms.

VOL. 3,

FORMS AND NOTES.

SECTION I.

ORDER OF PLEADING.

I.—Course of a suit in equity.

I. OF BILLS.

[Reduced from Mitford's Pleadings.]

I. BY WHOM AND AGAINST WHOM A BILL MAY BE EXHIBITED.

1. By whom.
 - { 1. On behalf of the crown, etc., by attorney general.
 - { 2. On behalf of bodies politic and corporate, etc., } by themselves.
 1. Alone { bodies politic and corporae, persons of full age not married women, infants, or lunatics.
 2. Under the protection of others.
 1. Infants. 2. Married women. 3. Idiots and lunatics.
2. Against whom.
 - { 1. Where prerogative rights are concerned } against attorney general.
 - { 2. In all other cases against all bodies politic, corporate, and all persons, etc.

II. OF THE SEVERAL KINDS AND DISTINCTIONS OF BILLS.

- I. *Original bills.*
 1. Praying relief:
 1. Decree touching right adverse to defendant. 2. A bill of interpleader. 3. A certiorari bill.
 2. Not praying relief.
 1. To perpetuate testimony. 2. Bill for discovery.
- II. *Bills not original.*
 1. Supplemental; 2. Revivor; 3. Revivor and supplement.
- III. *Bill in the nature of original bills.*
 1. Cross-bill; 2. Bill of review; 3. Bill in the nature of a bill of review; 4. Bill to impeach decree for fraud; 5. Bill to suspend or avoid execution of decree; 6. Bill to carry decree into execution; 7. Bill in nature of bill of revivor; 8. Bill in nature of a supplemental bill.

III. FRAME AND END OF BILLS AND OF INFORMATIONS.

- I. *Original bills.*
 1. Praying relief.
 1. Praying decree; 2. Interpleader; 3. Certiorari bill.
 2. Not praying relief.
 1. To perpetuate testimony; 2. For discovery.
- II. *Bills not original.*
 1. Supplemental; 2. Revivor; 3. Revivor and supplement.
- III. *Bills in the nature of original bills.*
 1. Cross-bill; 2. Bill of review; 3. Bill in nature of bill of review; 4. To impeach, etc; 5. To suspend or avoid execution; 6. To carry into execution; 7. In nature of bill of revivor; 8. In nature of a supplemental bill.
- IV. *Informations.*

II. OF DEFENSE TO BILLS.

I. BY WHOM A SUIT MAY BE DEFENDED.

1. On behalf of crown, etc.: by attorney general, or other proper officer.
2. On behalf of bodies politic, corporate and natural without prerogative.
 1. By themselves: bodies politic and corporate and natural persons of full age, and sound mind, not women, idiots, or lunatics.
 2. Under protection of, or with others.
 1. Infants; 2. Idiots and lunatics; 3. Married women.

II. NATURE OF VARIOUS MODES OF DEFENSE TO A BILL.

I. *Demurrers.*

1. To original bills.

1. To relief.

1. Subject not within jurisdiction of a court of equity.
 1. Where powers of court of law are not sufficient.
 1. Where no, or no complete, remedy. 2. Where remedy attempted is defeated by fraud or accident.
 2. Where courts of ordinary jurisdiction are made instruments of injustice; 3. Where universal justice suggests, but positive law is silent; 4. To remove impediments; 5. To preserve property *pendente lite*; 6. To prevent assertion of doubtful rights, etc. 7. To prevent injury to third person by doubtful title of others. 8. To put a bound to litigation; 9. Compel a discovery; 10. Preserve testimony.
2. Some other court of equity has the proper jurisdiction.
3. Plaintiff disabled to sue.
4. Plaintiff has no interest or title.
5. Plaintiff has no right to call on defendant concerning the subject.
6. Defendant has not interest making him liable to plaintiff.
7. That plaintiff, by the substance of his case, is not entitled to relief.
8. Bill deficient to accomplish justice.
9. Distinct objects are confounded in the same bill.

2. To bills for discovery.

1. Case not made to compel.
2. Plaintiff } not interested, etc.
3. Defendant } not interested, etc.
4. No privity of title between parties giving plaintiff a right.
5. Discovery, if obtained, not material.
6. Defendant's condition renders improper.

2. To every other kind of bill.

1. Bills of revivor and supplemental bill.
2. Cross-bills.
3. Bills of review, etc.
4. Bills to carry a decree into execution.
5. Bills in nature of bills of revivor, or bills of supplement.

III. FRAME OF DEMURRERS AND MANNER OF DETERMINING THEIR VALIDITY.

III. PLEAS.

1. To original bills.

1. For relief.

1. Subject not within jurisdiction of a court of equity.
2. Some other court of equity has the proper jurisdiction.
3. Plaintiff disabled to sue.
 1. Outlawed; 2. Excommunicated; 3. Popish recusant; 4. Attainted; 5. An alien; 6. Incapable of suing alone.
4. Plaintiff a pretender.
5. Plaintiff not real party, etc.
6. Plaintiff has no right to call on defendant, etc.
7. Defendant not person he is alleged to be, etc.
8. Defendant not interested in subject, etc.
9. For a reason founded on substance, plaintiff not entitled to relief.
 1. Matters of record: 1. Decree or order; 2. Another suit depending.
 2. Matters of record, or as of record in a court not of equity.
 1. A fine; 2. A recovery; 3. A judgment or sentence.
 3. Matters in pais.
 1. A stated account; 2. An award; 3. A release; 4. A will, or a conveyance; 5. Circumstances, etc.
10. Supposing plaintiff entitled defendant equally entitled to protection of court.
11. Bill deficient to accomplish complete justice.

2. To bills of discovery.

1. Not within jurisdiction.
2. Plaintiff } not interested.
3. Defendant } not interested.
4. Defendant's situation renders it improper to compel discovery.
 1. Because it may subject defendant to pains and penalties.
 2. Subject him to a forfeiture.
 3. Betray a trust reposed in (a) counsel; (b) attorney, or (c) arbitrator.
 4. He is a purchaser for a valuable consideration without notice of the plaintiff's title.

2. To bills not original: 1. Revivor; 2. Supplemental.

3. To bills in the nature of original bills.

1. Cross-bills; 2. Bills of review, etc.; 3. Bills to carry decrees into execution; 4. Bills in the nature of bills of revivor, or of supplemental bills.

4. Of matters relative to pleas in general.

1. Nature; 2. Form; 3. Manner offered; 4. Manner of deciding validity.

1. *Answers and disclaimers.*

1. Nature; 2. Form; 3. Manner of testing sufficiency and supplying deficiencies; 3. Nature and form of disclaimers.

2. *Demurrers, pleas, answers, and disclaimers or any two or more of them jointly.*

IV. OF REPLICATIONS AND THEIR CONSEQUENCES.

1. Of general replications; 2. Of special replications, and the subsequent pleadings anciently used. 3. Of subpoenas to rejoin and rejoinder.

V. OF INCIDENTS TO PLEADINGS IN GENERAL.

2.—Course of an action at law.

[Reduced from Chitty's Pleadings.]

I. BY WHOM AND AGAINST WHOM. [See FORM 1, *ante* p. 1.] Of the parties to actions.

II. OF THE FORM OF ACTION.**I. ACTIONS EX CONTRACTU.**

1. Assumpsit.

- 1. The *indebitatus*.
- 2. The *quantum meruit*.
- 3. The *quantum [valebat] valebant*.
- 4. The account stated.

2. Debt. 3. Covenant. 4. Detinue.

II. ACTIONS EX DELICTO.

- 1. Actions on the case. 2. Trover. 3. Replevin. 4. Trespass. [*Vi et armis; contra pacem*.]
- 1. For injuries not committed under color of legal proceedings—
 - 1. For the parties' own act.
 - 1. Injuries to the person;
 - 2. Injuries to personal property;
 - 3. Injuries to real property.
 - For the acts of others, and of cattle, etc.
- 2. For injuries under color of legal proceedings.
 - 1. Excess of jurisdiction, force, etc. 2. No jurisdiction. 3. Proceeding defective. 4. Process misapplied. 5. Process abused. 6. Proceeding without warrant.
- 5. Ejectment:
 - 1. For what property;
 - 2. The title thereto;
 - 3. The injury, and by whom committed.

III. OF THE PRÆCIPE AND PROCESS.**IV. OF THE PLEADINGS.**

- 1. The title of the court and term;
- 2. The venue;
- 3. The commencement;
- I. THE DECLARATION:**
 - 4. The statement of the cause of action.
 - 5. The several counts (paragraphs);
 - 6. The conclusion;
 - 7. The profert and pledges.

II. OF PLEAS TO THE JURISDICTION AND IN ABATEMENT, AND THE PROCEEDINGS THEREON.

- 1. Form of a plea.
 - 1. The title of the term.
 - 2. The commencement.
 - 1. Statement of appearance.
 - 2. Nature of defense.
 - 3. Prayer that the bill or writ be quashed, etc.
 - 3. The body or subject matter.
 - 4. The conclusion.

V. OF THE CLAIM OF CONUSANCE, APPEARANCE AND DEFENSE, OYER AND IMPARLANCES.

- 1. Common or general.
- 2. Special.
- 3. General special.

IV. OF THE PLEADINGS—CONTINUED.**III. OF PLEAS IN BAR.****I. OF THE QUALITIES OF PLEAS IN BAR.***General qualities:*

- 1. Adapted to the form and nature of the action, and conformable to the count.
- 2. Answer all it assumes to answer—no more.
- 3. If special, that it *confess* or *admit* the fact.
- 4. That it be single.
- 5. That it be certain.
- 6. That it be (*not argumentative*, but) direct and positive.
- 7. That it be capable of trial.
- 8. That it be true.

V. OF THE PLEADINGS—CONTINUED.

II. FORM AND PARTS OF A PLEA IN BAR.

1. The title of the court in which it is pleaded.
2. The title of the term.
3. The names of the parties in the margin.
4. The commencement, which includes—
 1. The name of the defendant;
 2. The appearance; [*Venit.*]
 3. The defense; [*Defendit.*]
 4. The *actio non*, being either a general or a partial denial of the right of action.
5. The body, which may contain—
 1. Inducement;
 2. Protestation;
 3. The ground of defense;
 4. *Quæ est eadem*;
 5. Traverse.
6. The conclusion.

III. THE DEFENSES TO ACTIONS.

1. On contracts.
 1. Deny that there ever was a cause of action.
 1. Deny that a sufficient contract was made.
 1. That no contract was, in fact, made.
 2. That defendant was incapable to contract—
 1. Infant. 2. Lunatic, drunkard, etc. 3. Under coverture; 4. Under duress.
 3. Insufficiency or illegality of consideration, or made under a mistake or fraud.
 4. Act to be done is—
 1. Illegal;
 2. Impossible.
 5. Form insufficient under statute of frauds, not stamped, etc.
 2. Admit a sufficient contract, but show that before breach there was—
 1. A release;
 2. A parol discharge;
 3. Alteration in terms by consent;
 4. Non-performance, alteration, etc., by plaintiff;
 5. Performance, payment, etc.;
 6. Contract became—
 1. Illegal;
 2. Impossible to perform.
 2. Admit that there was a cause of action; but avoid it by subsequent or other matter.
 1. Disability of the plaintiff to sue—
 1. Alien enemy;
 2. Attainted;
 3. An outlaw;
 4. A bankrupt, insolvent debtor, etc.
 2. Defendant not liable—
 1. A certificated bankrupt;
 3. An insolvent debtor.
 3. Debt recoverable only in a court of conscience.
 4. Cause of action discharged—
 1. By payment;
 2. By accord and satisfaction;
 3. By foreign attachment;
 4. By tender;
 5. By account stated, and a negotiable security given;
 6. By arbitrament;
 7. By former recovery;
 8. By higher security given;
 9. By a release;
 10. By the statute of limitations;
 11. By set-off.
 5. Pleas by executors, etc.
2. To an action on a record.
 1. On a judgment.
 1. Deny that there ever was a cause of action: *nul tiel record*,
 2. Admit there was a cause of action; but aver—
 1. Disability of plaintiff;
 2. Defendant not liable to be sued.
 3. Matter in discharge—
 1. Payment. 2. Release. 3. Levied by *ieri facias*.
 4. Levied by *elegit*. 5. Levied by *ca. sa.* 6. *Plene administravit*. 7. Implied limitations.

IV. OF THE PLEADINGS—CONTINUED.

III. THE DEFENSES TO ACTIONS—Continued.

2. To an action on a record—Continued.
 2. On recognizance of bail.
 1. Deny that there ever was a cause of action.
 1. *Nil tuel* record of judgment or recognizance.
 2. No *ca. sa.*
 3. Death of principal.
 4. Render of principal.
 5. Error, supersedeas, etc.
 2. Admit that there was once a cause of action; but aver—
 1. Disability of plaintiff to sue;
 2. Defendant discharged by bankruptcy, etc.
 3. Matter in discharge—
 1. Payment;
 2. Release to principal or bail;
 3. *Fi. fa.*;
 4. *Elegit*;
 5. *Ca. sa.*
3. To an action on a statute.
 1. Denial of the fact.
 1. *Nil debet*.
 2. Not guilty.
 2. Prior suit depending for the same offense.
 3. Former recovery for the same offense.
4. To an action for a tort.
 1. Deny that plaintiff ever had a cause of action.
 1. Deny that defendant was guilty of the tort complained of.
 1. In case, of [or] trover; not guilty of the premises.
 2. In detinue: *non detinet*.
 3. In replevin: *non cepit*, or *cepit in alio loco*, or *property in defendant*, or *property in a stranger*.
 4. In trespass: *not guilty of the trespasses*.
 5. In ejectment: *not guilty of the trespass and ejectment*.
 2. Justify the act—
 1. In case: the words were true.
 2. In replevin: avowries and cognizances for rents, cattle damage-feasant, etc.
 3. In trespass:
 1. To persons: *son assault demesne*, etc.
 2. To personal property: distresses damage-feasant, etc.
 3. To real property: *liberum tenementum*, rights of common, ways, etc.
 3. Excuse the act—
 1. In case: that another person uttered the words, and defendant only repeated them.
 2. In trespass:
 1. Amicable contest;
 2. Inevitable necessity;
 3. Escape of cattle by defect of fences, etc.
 4. Chasing sheep intermixed with the plaintiff's, etc.
 2. Admit that the plaintiff once had a cause of action; but insist that it is discharged by—
 1. Accord and satisfaction;
 2. Arbitrament;
 3. Tender of amends for an involuntary trespass;
 4. Former recovery;
 5. Distress for the same cause.
 6. Release;
 7. Statute of limitations.

IV. OF REPLICATIONS.

1. The replication to a plea.
 1. In assumpsit.
 2. In debt.
 3. In covenant.
 4. In detinue.
 5. Against executors and heirs.
 6. In case.
 7. In trover.
 8. In replevin.
 9. In trespass.

IV. OF THE PLEADINGS—Continued.**IV. OF REPLICATIONS—Continued.****2. Form and parts of replication.**

- 1. The commencement (after *Title*).
- 2. The body—
 - 1. Matter of estoppel.
 - 2. Denial of the plea.
 - 1. A denial of the *whole plea*, or *de injuria*.
 - 2. A denial of only a *part* of the plea.
 - 1. What fact denied.
 - 2. Form of denial.
 - 1. Protestation.
 - 2. Denial and conclusion to the country.
 - 3. Traverse and verification.
 - 3. A denial and stating a particular breach, etc.
 - 3. Confession and avoidance of the plea.
 - 4. A new assignment.
- 3. The conclusion.

3. Qualities of replication.

- 1. Answer so much as it professes to answer.
- 2. Conformable to and not depart from the count.
- 3. Certain, direct, and positive (not argumentative), and be triable.
- 4. Must be single.

V. OF REJOINDERS AND SUBREJOINDERS, REBUTTERS, AND SUBREBUTTERS.**VI. OF DEMURRERS AND JOINDERS IN DEMURRER.**

THE COMPLAINT.

SECTION II.

AGREED CASE.

3.—Ordinary form.

State of Indiana, County of Switzerland.
In the Switzerland Circuit Court, May Term, 1885.

A. B. }
v. }
C. D. } Submission of agreed case without action.

A. B. and C. D. respectfully present to the court a submission of the following controversy between them without bringing an action, and agree upon the case following, to wit:

C. D. claims of A. B. [*state what*].

A. B. claims to recover of C. D. — articles [land], [dollars].
[*Here state concisely every fact essential to the claim or defense*].

The court is at liberty to draw inferences of fact.

None of the admissions herein are to affect either party, or to be used except for the purposes of this submission.

The questions desired to be submitted are as follows [*state all questions intended to be raised on the facts submitted*].

[*Signature of the parties.*]

[*Affidavit.*]

State of Indiana, Switzerland County:

A. B. and C. D., being severally duly sworn, say that the controversy submitted in the foregoing case is real and the proceedings are in good faith to determine the rights of the parties.

[*Signatures.*]

Subscribed and sworn to before me this — day of —, 18—.

R. T. F. ABBETT,

Clerk Switzerland Circuit Court.

1. The statement. Ante, vol. 1, § 997.

2. The affidavit. R. S. 1881, § 553. Ante, vol. 1, §§ 249, 812, 813.

3. Judgment. Ante, vol. 1, § 997.

4. No pleadings required. As no pleadings are required, they will be disregarded on appeal. Ante, vol. 1, § 813; *The Warrick, etc., Association v. Hougland*, 90 Ind. 115.

SECTION III.

FORMAL PARTS OF PLEADINGS.

4.—Caption.

The State of Indiana, Ohio County.

In the Ohio Circuit Court, May Term, 1885.

A. B.	}	Complaint; amended complaint; amendment to the complaint; supplemental complaint.
v.		
C. D.		

[*Commencement and statement of cause of action.*]

5.—Action by administrator.

The State of Indiana, — County.

— Circuit Court, — Term, 18—.

A. B., Administrator of the estate of C. D.,	}	Complaint.
v.		
E. F.		

[*Commencement and statement of cause of action.*]

6.—By partners.

[*Style, venue, court, and term.*]

A. B., C. D., and E. F., partners doing business under the firm name of A. B. & Company,	}	Complaint.
v.		
G. S. and R. S., partners doing business under the firm name of Smith Brothers.		

[*Commencement, etc.*]

7.—Corporations.

[*Style, etc.*]

The First National Bank of Vevay, Indiana,	}	Complaint.
v.		
The Vevay Woolen Mills.		

[*Commencement, etc.*]

8.—State on relation, etc.

[*Style, etc.*]

The State of Indiana on the relation of James H. Rice, Auditor of the State of Indiana,	} Complaint.
v.	
Charles Adams, Treasurer of Switzerland County, State of Indiana.	

[*Commencement, etc.*]

1. **What included in caption.** 1, the state; 2, county; 3, name of court; 4, the term; 5, names of parties.

2. **Title of cause required by statute.** R. S. 1881, § 338.

3. **Is matter of form.** While the title of a cause is expressly required by statute, it is held to be matter of form only, and the defect can not be reached by demurrer, but by motion. Ante, vol. 1, § 345; *Smith v. Flack*, 95 Ind. 116.

4. **Individual names of partners must be given.** Ante, vol. 1, § 345; *Hays v. Lanier*, 3 Blkf. 322; *Livingston v. Harvey*, 10 Ind. 218.

COMMENCEMENT.

9.—Common form.

[*Caption.*]

The plaintiff complains of the defendant, and alleges:

That [*state cause of action*].

Second paragraph:

The plaintiff, for further cause of action, alleges:

That [*state second cause of action*].

10.—Plaintiff suing for himself and others.

[*Caption.*]

The plaintiff, for himself and others similarly situated, the stockholders of —, who are very numerous, being more than — in number, complains of the defendant and alleges [*state cause of action*].

1. **Commencement not necessary.** No commencement is necessary, and some authors urge that it should be entirely omitted, except in special cases. 1 Bates' Pl. and Par. 233. But a properly worded commencement adds to the symmetry of the pleading and renders it more finished. For this reason, if for no other, it is better to use it.

2. **Names of parties need not be repeated.** The names of the parties should be fully stated in the caption. This being done, they need not be repeated in the body of the pleading. *Lowry v. Dutton*, 28 Ind. 473.

3. Each cause of action must be separately stated and numbered. R. S. 1881, § 338; ante, vol. 1, § 587.

4. Effect of using wrong name in caption or commencement. It is important that names of parties should be properly stated. The misdescription of the party suing or sued, as an officer, has frequently resulted in total defeat. *Hornby, Trustee, v. The State*, 69 Ind. 102, and cases cited. And an otherwise bad pleading is sometimes cured by the use of proper care in entitling the cause. Ante, vol. 1, § 345.

PRAYER FOR RELIEF.

II.—Various forms.

[*Caption, commencement, and statement of cause of action.*]

Wherefore, the plaintiff demands judgment for — dollars; *or*, wherefore, the plaintiff demands judgment for — dollars, *and all other proper relief*; *or*, wherefore, the plaintiff asks that the defendant be compelled to perform his agreement as above alleged, and that the plaintiff have judgment for — dollars, and all other proper relief; *or*, wherefore, the plaintiff asks judgment for — dollars, and the foreclosure of the mortgage above set out, and the sale of the property therein described, or so much thereof as may be necessary to pay plaintiff's judgment, and the costs of this action, and accruing costs, and for all other proper relief; *or*, wherefore, the plaintiff demands judgment for the recovery of the property above described, and — dollars damages for the detention thereof, and for all other proper relief; *or*, wherefore, the plaintiff demands judgment for the recovery of the real estate above described, and — dollars damages for being kept out of the possession thereof, and for all other proper relief; *or*, wherefore, the plaintiff asks that said premises may be sold, and the proceeds applied to the payment of said indebtedness, and for all other proper relief.

1. Prayer controlled by facts alleged. Ante, vol. 1, § 424; *Mark v. Murphy*, 76 Ind. 534.

2. General prayer sufficient. Ante, vol. 1, § 424; *Shotts v. Boyd*, 77 Ind. 223.

3. On default, limits amount of recovery. Ante, vol. 1, § 425; R. S. 1881, § 385.

4. Bad prayer does not vitiate pleading. *Mark v. Murphy*, 76 Ind. 534.

5. Defects in not reached by demurrer. Ante, vol. 1, § 510; *Stribling v. Brougher*, 79 Ind. 328.

SUBSCRIPTION.

12.—Common form.

[Caption, commencement, statement of cause of action, prayer for relief.]

JOHN DOE, or,
SCOTT CARTER,
Attorney for Plaintiff.

1. Pleadings must be signed by party or his attorney. R. S. 1881, § 358; ante, vol. 1, § 426.

2. Failure to sign, effect of, and how reached. Ante, vol. 1, § 426.

VERIFICATION.

13.—Usual form.

The State of Indiana, ——— County.

A. B., the above named plaintiff [defendant], being duly sworn, says the facts stated in the foregoing complaint [answer], [reply], [cross complaint] are true.

Subscribed and sworn to before me this ——— day of ———, 18—.

[SEAL.]

C. D.,

Notary Public.

14.—By one of several parties.

A. B., being duly sworn, says he is one of the above named plaintiffs [defendants], and that the facts stated in the foregoing complaint [answer], are true.

[Signature.]

[Jurat.]

15.—By attorney or agent.

A. B., being duly sworn, says he is the attorney [attorney in fact], [agent] of the above named plaintiff [defendant], and that the facts stated in the foregoing complaint [answer], [reply], [cross complaint] are true.

[Signature.]

[Jurat.]

16.—By officer of corporation.

A. B., being duly sworn, says he is the president [cashier] of the above named plaintiff [defendant], the First National Bank of Rising Sun, Indiana, and that the facts stated in the foregoing complaint [answer], [reply], [cross complaint] are true.

[Signature.]

[Jurat.]

When a Corporation is a party the pleading may be verified by an officer, stockholder, agent, Superintendent, or attorney thereof and state that the facts stated in the pleading are true to the best knowledge and belief of such affiant.

1. Verification, when necessary. Ante, vol. 1, § 428-442; R. S. 1881, §§ 364, 365.

2. Failure to verify, how reached. Ante, vol. 1, § 428; Decker v. Gilbert, 80 Ind. 107.

3. Before whom. A pleading may be sworn to before any officer or person authorized, generally, to administer oaths.

4. Verified pleadings not proof. The pleading is not proof in favor of the party pleading it, nor does the verification dispense with any evidence that would otherwise be necessary on the trial. R. S. 1881, § 360.

SECTION IV.

ACCOUNT.

17.—For goods sold and interest on account of delay in payment.

[Caption and commencement.]

That the defendant is indebted to him in the sum of — dollars for goods and merchandise sold by plaintiff to defendant, a bill of particulars of which is filed herewith and made a part of this complaint.

That said sum of — dollars is now due and unpaid, and there has been long and unreasonable delay in the payment thereof.

Wherefore, plaintiff demands judgment for said sum of —, and interest thereon from the — day of —, 18—. A. B.,

Attorney for Plaintiff.

[Bill of particulars.]

1. When interest will be allowed. To entitle the plaintiff to recover interest, there must be long and unreasonable delay in payment, and this must be shown by the complaint. Marsteller v. Crapp, 62 Ind. 359; Young v. Dickey, 63 Ind. 31; Kend v. Boord, 75 Ind. 307.

18.—For work done.

[Caption and commencement.]

That defendant is indebted to plaintiff in the sum of — dollars for work done and materials furnished by plaintiff for him, a bill of particulars of which is filed herewith, and made part of this complaint.

That said sum is now due and unpaid.

Wherefore, etc.

[Signature.]

[Bill of particulars.]

1. Bill of particulars taken as part of complaint. The bill of particulars should be made certain and specific, as it thereby renders the complaint certain, as required. *Oliver v. Gorham*, 85 Ind. 598.

2. Request, when must be alleged. *Parker v. Clayton*, 72 Ind. 307; *Hoffman v. Board of Comrs.*, etc., 96 Ind. 84

19.—Money had and received.

[Caption and commencement.]

That the defendant is indebted to the plaintiff in the sum of — dollars for money had and received by the defendant for the use and benefit of the plaintiff, which sum is now due and unpaid.

Wherefore, etc.

[Signature.]

1. Bill of particulars not necessary, when. *The State v. Sims*, 76 Ind. 328; *Crane v. Crane*, 82 Ind. 459; *Spears v. Ward*, 48 Ind. 541.

2. Money misapplied by agent or bailee. Action for money had and received is proper where an agent or bailee has converted money to his own use that should have been paid to other parties or used for other purposes, and no demand is necessary. *Ferguson v. Dunn's Adm'r*, 28 Ind. 58; *Bunger v. Roddy*, 70 Ind. 26.

See MONEY HAD AND RECEIVED, page 224; AGENT, p. 20.

20.—For money paid.

[Caption and commencement.]

That the defendant is indebted to the plaintiff in the sum of — dollars for money paid by the plaintiff for the use of the defendant, at his request, which sum is due and unpaid.

Wherefore, etc.

[Signature.]

1. That amount is due equivalent to unpaid. *Mazes v. Goldsmith*, 58 Ind. 94; *Hartlep v. Cole*, 94 Ind. 513; *Gordon v. Gordon*, 96 Ind. 134.

21.—For professional services.

[Caption and commencement.]

That the defendant is indebted to the plaintiff in the sum of — dollars for professional services as a physician [*or, attorney at law*], [*or state their nature*], rendered by the plaintiff for the defendant [*or, for A. B., at the request of the defendant*], a bill of particulars of which is filed herewith, and made part of this complaint, which sum is due and unpaid.

Wherefore, etc.

[Signature.]

[Bill of particulars.]

22.—For use and occupation.

[*Caption and commencement.*]

That on —, at —, the plaintiff rented to the defendant, and the defendant hired from the plaintiff [*describe the house, office, room*], at the rent of — dollars per month, payable monthly [quarterly], [annually], on the first day of each month [quarter], [year].

That defendant occupied the said premises under said renting from the — day of — to the — day of —.

That there is now due and unpaid of said rent the sum of — dollars.

Wherefore, etc.

[*Signature.*]

23.—Implied contract for use and occupation.

[*Caption and commencement.*]

That the defendant, by permission of the plaintiff, occupied the following premises owned by the plaintiff, to wit [*describe them*], from the — day of —, 18—, to the — day of —, 18—.

That the use of said premises for the said period was reasonably worth — dollars.

That said sum is now due and unpaid.

Wherefore, etc.

[*Signature.*]

24.—Hire of personal property.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant hired from the plaintiff —, the property of the plaintiff, which he used from the — day of —, 18—, to the — day of —, 18—, and agreed to pay him therefor the sum of — dollars [*or, — dollars per day*], [*or, that the use of said property was reasonably worth the sum of — dollars*].

That said sum is now due and unpaid.

Wherefore, etc.

[*Signature.*]

25.—By an assignee.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was indebted to one E. F. in the sum of — dollars, on an account for money lent by said E. F. to him, and for money paid, laid out, and expended by said E. F. to and for the use of the defendant, and, at his request, as set forth in an account, of which the following is a copy [*copy account*].

That thereafter said E. F. assigned said account to this plaintiff by indorsement in writing, of which the defendant had due notice.

That there is now due and unpaid of said indebtedness the sum of — dollars.

Wherefore, etc.

[Signature.]

1. Bill of particulars, when necessary. *State v. Sims*, 76 Ind. 326; *Lassiter v. Jackman*, 88 Ind. 118.

2. Assignment. An account may be assigned, but it should be duly itemized. *Ante*, vol. 1, § 42; *Bay v. Saulspagh*, 74 Ind. 397.

3. Parties. The assignment must be by indorsement in writing, or the assignor must be made a party to the action. *R. S.* 1851, § 276; *ante*, vol. 1, § 181.

4. Account, how pleaded before county commissioners. *Newson v. The Board, etc.*, 92 Ind. 229; *The Board, etc. v. Gillam*, 92 Ind. 511.

SECTION V.

ACCOUNT STATED.

26.—On an account stated.

[Caption and commencement.]

That the defendant is indebted to the plaintiff in the sum of — dollars, on an account stated between said parties on said date, upon which statement a balance of — dollars was found to be due the plaintiff from the defendant, which amount the defendant agreed to pay.

That said sum of — dollars is now due and unpaid.

Wherefore, etc.

[Signature.]

1. Promise to pay balance found due implied. The allegation of a promise to pay is not necessary, as it will be implied; but it is better to allege it directly. *Bourlog v. Garrett*, 39 Ind. 338.

2. What is an account stated. An account stated is an agreement, between the parties to an account, that all the items are true. *Stenton v. Jerome*, 54 N. Y. 480; *Terry v. Sickles*, 13 Cal. 427; *Reinhardt v. Hines*, 51 Miss. 344; *Abbott's Trial Ev.* 458; *Cobb v. Arundell*, 26 Wis. 553; 1 *Bates' Pl. and Par.* 257; 1 *Estee's Pl. and Forms*, 376; *Bourlog v. Garrett*, 39 Ind. 338.

3. Admission of correctness by not objecting. An account rendered and not objected to within a reasonable time may be regarded as admitted to be *prima facie* correct. But an admission by mere silence may be rebutted by circumstances. *Wiggins v. Burkham*, 10 Wal. 129; *Terry v. Sick-*

les, 13 Cal. 427; Lockwood v. Thorne, 18 N. Y. 285; Stenton v. Jerome, 54 N. Y. 480; Toland v. Sprague, 12 Peters, 300, 335; 1 Estee's Pl. and Forms, 377.

This doctrine of assent by retention of the account is held in some cases to apply only as between merchants. Anding v. Levy, 34 Am. Rep. 435 and note; S. C., 57 Miss. 51.

4. Is a new cause of action. The agreement of the parties, which constitutes an account stated merges the original accounts, and in the absence of fraud or mistake, the original items of account can not be inquired into. Abbott's Trial Ev. 458; McClelland v. West, 70 Pa. St. 183.

5. Is not conclusive when. Bouslog v. Garrett, 39 Ind. 338.

27.—Surcharging and falsifying account stated.

[*Caption and commencement.*]

On the — day of —, 18—, the plaintiff and defendant accounted together concerning mutual dealings before that time had between them, whereby a settlement was had and a stated account in writing made, a copy of which is hereto annexed, marked exhibit A, whereby a balance of — dollars was found due to [or, from] plaintiff from [or, to] defendant.

That, at the time of accounting, certain errors and false charges, of which he was then wholly ignorant, were, by mistake and oversight, made in the account, in the following particulars, to wit, he is entitled to the following credits, which are wholly omitted from said account [*set forth the items, with dates, amounts, etc.*]

That the following items in said account are wrongly charged [overcharged], to wit [*state the items wrongly or wrongfully charged, and show the error.*]

That within a reasonable time after discovering the same, he notified defendant thereof, and requested that the same be corrected and the account restated, which defendant refused to do.

That said account should be corrected in said particulars, and the balance due plaintiff [defendant] should be — dollars.

Wherefore, plaintiff prays that he may be let in to prove said errors in said account, and that judgment be rendered in his favor against defendant for the corrected balance of — dollars, with interest from the — day of —, and for all other proper relief. [Or, and that judgment be rendered declaring the true and correct amount due the defendant from plaintiff, and for all other proper relief.]

[*Copy of stated account.*]

[*Signature.*]

1. Account may be set aside or corrected on account of fraud or mistake. The accounting, like other contracts, is binding upon the par-

ties in the absence of fraud or mistake. The action should be for relief against the stated account, and not to recover the balance due without setting aside the accounting. *McDougall v. Cooper*, 31 N. Y. 489; *Lockwood v. Thorn*, 18 N. Y. 285, 292; *Bouslog v. Garrett*, 39 Ind. 388.

The complaint must allege specifically in what the fraud or mistake consists, and the proof must be clear and decisive. *Barker v. Hoff*, 52 How. Pr. 382; *Augsbury v. Flower*, 68 N. Y. 619.

And the burden of proof is upon the party impeaching the account. *Mass. Mut. L. Ins. Co. v. Carpenter*, 49 N. Y. 668.

2. Effect of opening account. The effect of surcharging and falsifying an account is to leave it an account stated, except so far as it can be impugned. 1 *Estee's Pl. and Forms*, 379; *citing* 2 Ves. Sen. 565; 11 Wheat. 237; *Story's Eq. Pl.* § 801; 1 *Story's Eq. Jur.* § 523; *Bruen v. Hone*, 2 Barb. 586; *Bullock v. Boyd*, 2 Edw. 293; *Phillips v. Belden*, 2 Edw. 1.

But if the plaintiff opens the account, it becomes subject to objection to any of its items by the defendant. *Young v. Hill*, 67 N. Y. 162.

SECTION VI.

ACCOUNTING.

28.—To compel settlement of mutual accounts.

[*Caption.*]

The plaintiff complains of the defendant, and alleges:

That plaintiff and defendant have had mutual dealings for — years, each keeping his own accounts, the items of which are very numerous.

That on the — day of —, 18—, the plaintiff offered to the defendant to produce his accounts, and requested the defendant to produce his, in order to come to a settlement of said accounts; but the defendant refused to produce his accounts, and to come to an adjustment.

That there is due plaintiff, as a balance on said mutual accounts, about — dollars.

Wherefore, plaintiff prays that the defendant may be ordered to come to an account, and that he may have judgment for the balance found due him, with interest from —.

[*Signature.*]

1. Plaintiff may sue for amount due without an accounting. An action to compel an accounting is rarely resorted to in practice. The plaintiff may sue for the whole of his account, and leave the defendant to plead his as an offset, or bring a separate action, and this course is usually taken.

29.—To compel an accounting.

[*Caption and commencement.*]

That the defendant had been the agent of plaintiff during the years — [or, from — to —], during all which time he had the care and management of personal property of plaintiff, to wit [*describe property, and give value*], to sell for plaintiff's benefit, and render him an account thereof, on demand.

That defendant has disposed of said property, yet neglects and refuses to render an account thereof to plaintiff, though requested so to do, or to pay plaintiff the amount due him.

That there is now due the plaintiff from the defendant a sum, the amount of which is unknown.

Wherefore, the plaintiff prays that the defendant be compelled to render an account thereof, and for judgment for the amount due.

[*Signature.*]

30.—For accounting from a trustee, and for his removal, and for a receiver.

[*Caption and commencement.*]

That on the — day of —, one M., the father of plaintiff, by his last will, conveyed to the defendant, E. F., the following property: The following described real estate [*describe it*]; United States four per cent bonds of the par value of —, and one-third of the residue of all testator's personal property, after payment of certain bequests and the debts and costs of administration. All said property subject to the following trusts, viz: to divide all the income, rents, and profits equally between plaintiffs and one H., during their lives, and on the death of each, to divide his share of said income equally between his surviving children, etc., with power to sell and reinvest said personal property and securities.

That said will was admitted to probate on the — day of —, and on the — day of —, the executor of the estate of said M. paid over to the said E. F. the sum of — dollars, as the one-third of the residue of the personalty so devised in trust.

That on the — day of —, said H. died, leaving the defendants, K. and L., as his only children and heirs at law, who are minors.

That on the — day of —, the said E. F. accepted said trust, and has ever since received the rents, profits, and incomes of said trust property, amounting to about — dollars each year, and has sold or otherwise disposed of part of said securities, but what part is

unknown to plaintiffs, and has converted the proceeds to his own use.

That the said E. F. has, during said period, paid over to the plaintiffs — dollars, and no more, and has converted the residue to his own use.

That the plaintiffs have frequently requested from the defendant an account of the rents, profits, and income of said estate, and on the — day of —, demanded of him an account thereof, and payment of the amounts due, but defendant refused and still refuses.

That the defendant threatens, and is about to, and will, unless restrained by this court, convert other portions of said property to his own use.

Wherefore, the plaintiffs pray that an account be taken of said trust property, and of the rents, income, and profits thereof, which have come or should have come into said E. F.'s hands, and that he be required to account for and pay their proportion of same to the plaintiffs, and that he be removed from the trusteeship, and that another be appointed in his stead, and that in the meanwhile a receiver be appointed to take charge of said estate and collect the rents and income, and for all other proper relief. [Signature.]

1. Demand for an accounting necessary. As a rule, a demand is necessary, but there are exceptions, as in other cases where a demand must precede the action. *Ante*, vol. 1, §§ 262, 263; *Robinson v. Skipworth*, 23 Ind. 311; *Ferguson v. Dunn's Adm'r*, 28 Ind. 58; *The Jeffersonville, etc., R. R. Co. v. Gent*, 35 Ind. 39; *Nelson v. Corwin*, 59 Ind. 489; *Proctor v. Cole*, 66 Ind. 576; *Bunger v. Roddy*, 70 Ind. 26; *Snyder v. Baber*, 74 Ind. 47.

2. Who entitled to an accounting. 1 *Wait's Ac. and Def.* 173, 174, 187; *Salter v. Ham*, 31 N. Y. 321; *Arnold v. Angell*, 62 N. Y. 508; *Wood v. Brown*, 34 N. Y. 337; *Southall v. Shields*, 81 N. Ca. 28; *Williams v. Slote*, 70 N. Y. 601; 1 *Bates' Pl. and Par.* 263; *Cottle v. Leitsch*, 35 Cal. 434; *Cummins v. White*, 4 Blkf. 356; *Peck v. Braman*, 2 Blkf. 141; *Bougher v. Scobey*, 16 Ind. 161; *Smith v. Hazleton*, 34 Ind. 481; *Emmons v. Lewman*, 38 Ind. 372; *Keith v. Hudson*, 74 Ind. 333; *Meredith v. Ewing*, 85 Ind. 410.

3. As between partners. A partner may compel an accounting, and recover the amount found to be due him in the same action, but an action for the amount due, without an accounting, can not be maintained. *Briggs v. Daugherty*, 48 Ind. 247; *Snyder v. Baber*, 74 Ind. 47.

See PARTNERSHIP, p. 261.

SECTION VII.

AGENTS.

31.—By third person against agent on implied warranty of authority to contract.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of plaintiff's entering into a contract with L. M. [*state in terms briefly, e. g.*] to deliver ten tons of steel to L. M., to be by him manufactured into rails, at a cost of — dollars, to be paid by plaintiff, defendant warranted to plaintiff that L. M. had authorized defendant to make said contract with L. M., as his agent, in reliance on which warranty plaintiff entered into said contract with defendant as agent for L. M.

That defendant was not authorized by said L. M. to make said contract for him, by reason whereof plaintiff was not able to and did not obtain performance of the same, and lost the benefit thereof.

That [*state what special damages there were, e. g.*] the market price had risen from the said contract price to — dollars before plaintiff learned that said contract could not be enforced, which plaintiff was compelled to pay to obtain said steel, and he was put to the expense of — dollars in performing said contract on his part, and incurred — dollars expense in endeavoring to enforce performance from said L. M. by action at law, to plaintiff's damage — dollars.

Wherefore, etc.

[*Signature.*]

1. Implied warranty of authority. The agent contracting is liable on an implied warranty of authority, and not on the contract as being his own. *White v. Madison*, 26 N. Y. 117.

2. Measure of damages. *White v. Madison*, 26 N. Y. 117.

3. When agent personally liable. *Lewis v. Reed*, 11 Ind. 239; *Pitman v. Kintner*, 5 Blkf. 250; *Herod v. Rodman*, 16 Ind. 241; *Prather v. Ross*, 17 Ind. 495

32.—By principal against agent for not accounting and paying over.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of a certain reward to be paid him by the plaintiff, and of the delivery to him of

the goods hereinafter mentioned, defendant agreed to act as plaintiff's agent in selling certain goods for plaintiff*, and to account for and pay over to him, on demand, the proceeds thereof. In pursuance of which agreement, plaintiff delivered to defendant and defendant received said goods, being [*describe same*] of the value of — dollars.

That the defendant afterward sold said goods for the sum of — dollars, and on the — day of —, plaintiff requested defendant to render an account of said sales, and pay over the proceeds thereof, but defendant has not rendered an account, or paid over said proceeds, or any part thereof, to the plaintiff's damage — dollars.

Wherefore, etc.

[*Signature.*]

1. Transaction illegal, principal may recover money collected, when. Daniels v. Barney, 22 Ind. 207; Barney v. Daniels, 32 Ind. 19.

33.—Non-delivery of part not sold.

[*Continue from *, Form 32*]; and to deliver to plaintiff such of said goods as should remain unsold, when requested.

That in pursuance of said agreement, plaintiff delivered to defendant and defendant received said goods, being [*describe them*] of the value of — dollars.

That there remained unsold of said goods the following [*describe them*], of the value of — dollars, which plaintiff, on the — day —, 18—, demanded of defendant to deliver back to plaintiff, but defendant has neglected and refused so to do, to the damage of plaintiff — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

34.—Disobeying instructions in selling.

[*Continue as in Form 32, from **]; and to obey plaintiff's instructions in the premises.

That in pursuance of said agreement, plaintiff delivered to defendant, and defendant received and accepted, the following goods [*describe them*].

That plaintiff instructed defendant to sell the same at not less than [*state the price*], [*or, to sell the same for ready money, and not on credit*].

That, notwithstanding said agreement, defendant afterward sold said goods at a less sum than said price, to wit, at the sum of [*state the price*], [*or, sold said goods otherwise than for ready money, to wit, on*

credit; or, exchanged the same for a horse], to plaintiff's damage — dollars.

Wherefore, etc.

[Signature.]

See MONEY HAD AND RECEIVED, page 224.

35.—Negligence in selling.

[Continue as in Form 32 to *]; and to use due and reasonable diligence in selling the same.

That in pursuance of said agreement, plaintiff delivered to defendant and defendant received and accepted said goods, being [*describe them*] of the value of — dollars.

That the defendant, by using due and reasonable diligence in selling the same, might and ought to have obtained the price of — dollars per hundred for said articles.

That defendant did not use due and reasonable diligence in selling said articles, but sold — hundred thereof for the sum of — dollars, and failed and neglected to sell the rest, whereby the same deteriorated in value, and the market price of the same fell, and plaintiff was forced to sell the same at — dollars per hundred, and plaintiff incurred an additional expense of — dollars in warehousing the same, and is otherwise injured, to his damage — dollars.

Wherefore, etc.

[Signature.]

See NEGLIGENCE, page 243.

36.—For carelessly selling to an insolvent.

[Caption and commencement.]

That on the — day of —, 18—, the defendant agreed with the plaintiff, as his agent and for compensation to be paid him by plaintiff, to sell for plaintiff the following goods [*describe them*], of the value of — dollars, and thereupon received the same from plaintiff for that purpose.

That the defendant did not use due diligence and care in selling said goods, but sold the same [*or, the following part of said goods*], [*describing them*] to a person in embarrassed circumstances, then well knowing financial embarrassments of said purchaser, without receiving the price therefor [*or, without taking security for the price thereof*], whereby the plaintiff has lost the price of said goods, and has expended the sum of — dollars in an attempt to collect the same by an action at law, to the damage of plaintiff — dollars.

Wherefore, etc.

[Signature.]

37.—Against forwarding agent for failure to forward goods.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was a forwarding agent and keeper of a warehouse at —, for the reception of goods to be forwarded by him for hire.

That on said day the plaintiff delivered to the defendant the following merchandise, to wit [*describe it*], the property of plaintiff, of the value of — dollars, which the defendant received, and agreed, for a consideration then paid by the plaintiff, to forward, in a reasonable time, from — to —, by a vessel, and until so forwarded, to store and safely keep the same.

That within a reasonable time thereafter, to wit, on the — day of —, 18—, a vessel did sail from said — to —, on which the defendant might and ought to have shipped said merchandise.

That defendant did not forward said merchandise within a reasonable time, but retained the same in his said warehouse for an unreasonable time, to wit, six months, whereby said goods perished, and the plaintiff was damaged in the sum of — dollars.

Wherefore, etc.

[*Signature.*]

1. Liability of forwarding agents. Forwarders are not insurers, but they are liable for injuries to property in their charge, resulting from negligence or misfeasance of themselves, their agents or employees. *Hooper v. Wells, Fargo & Co*, 27 Cal. 11.

2. Demand on agent for accounting, or payment, when necessary. *Dodds v. Vannoy*, 61 Ind. 89; *Pierre v. Thornton*, 44 Ind. 235; *Heddens v. Younglove*, 46 Ind. 212; *Kyser v. Wells*, 60 Ind. 261; *Terrell v. Butterfield*, 92 Ind. 1.

SECTION VIII.

ANIMALS.

38.—For injury to plaintiff by defendant's dog.

[*Caption and commencement.*]

That on and prior to the — day of —, 18—, the defendant kept a dog, which, as he well knew, was accustomed to attack and bite mankind [*or, which, as he well knew, was of a fierce and dangerous nature, and improper to be allowed to go at large*], yet defendant wrongfully and negligently allowed said dog to go at large without being properly secured.

That on said date said dog, without any fault on the part of the plaintiff, attacked, and bit, and wounded plaintiff by [*state the nature of the injury*], by reason of which the plaintiff became and was sick and lame for — weeks, and was unable, during that time, to attend to his business, and incurred — dollars expenses in getting cured, to his damage — dollars, for which he demands judgment.

[*Signature.*]

1. When owner liable for injury by animal. There is great conflict in the authorities as to the ground upon which the owner of an animal may be made liable. The rule seems to be established in England that it is not necessary to show negligence, or wrong, on the part of the defendant. *Cooley on Torts*, pp. 348, 349, 570; *Fletcher v. Rylands*, L. R. 1 Exch. 265; affirmed in House of Lords, L. R. 3 H. L. Cas. 330, 339, and cases cited.

But in this country the great weight of authority seems to place the liability on the ground of negligence. *Cooley on Torts*, pp. 348, 570; *Shear. and Red. on Neg.* § 7, 185; 1 *Thomp. on Neg.*, p. 201; *Favor v. Boston R. R. Co.*, 114 *Mass.* 350; *Losee v. Buchanan*, 51 *N. Y.* 476; *Rockwood v. Wilson*, 11 *Cush.* 221; *Brown v. Collins*, 53 *N. Y.* 442; *Earl v. Van Alstine*, 8 *Barb.* 630; 1 *Wat. on Tres.*, p. 1, § 19; 2 *Wat. on Tres.*, p. 286, § 264; *Fisher v. Clark*, 41 *Barb.* 329; *Williams v. Moray*, 74 *Ind.* 25.

But where the animal is vicious and accustomed to bite or otherwise injure mankind, *knowledge* of its dangerous propensities makes it the duty of the owner to keep it *securely*, and a failure to do so is negligence. *Partlow v. Haggarty*, 35 *Ind.* 178; *Williams v. Moray*, 74 *Ind.* 25.

The complaint must show, however, either by direct averment, or the facts pleaded, that the plaintiff is without fault. *Williams v. Moray*, 74 *Ind.* 25; *Eberhart v. Reister*, 96 *Ind.* 478.

39.—Statutory action for sheep killed or injured by dogs.

[*Caption and commencement.*]

That on the — day of —, 18—, and at divers times since, at —, a dog owned by the defendant killed — sheep, the property of the plaintiff, of the value of — dollars each, and injured — lambs, the property of the plaintiff, of the value of — dollars each, so that they afterward died, and worried — sheep, the property of the plaintiff, so that they were sick, and deteriorated in value to the amount of — dollars, to the plaintiff's damage, in all, — dollars, for which he demands judgment.

[*Signature.*]

1. Scienter need not be alleged. The action is statutory, and the statute makes the owner or harbinger liable for all damages or injury done to sheep, without reference to his knowledge of the evil propensities of the dog, or negligence. *R. S.* 1881, § 2644.

40.—Trespass by animals.

[Caption and commencement.]

That on the — day of —, 18—, and at divers other times between that day and the bringing of this action, certain horses and cattle, owned by [in charge of] defendant, were allowed by him to run at large, and broke and entered plaintiff's land, and trod down, eat up, and destroyed — acres of corn of the value of — dollars, and — acres of wheat of the value of — dollars, and injured — apple trees to the amount of — dollars, all being the property of the plaintiff, whereby the plaintiff was damaged in the sum of — dollars, for which he demands judgment.

[Signature.]

1. Owner of domestic animals bound to keep them on his own premises. R. S. 1881, § 4835; *Page v. Hollingsworth*, 7 Ind. 317; *Brady v. Ball*, 14 Ind. 317; *The Michigan, etc., R. R. Co. v. Fisher*, 27 Ind. 96; *The Jeffersonville, etc., R. R. Co. v. Adams*, 43 Ind. 402; *Stone v. Kopka*, 100 Ind. 458.

2. When allowed to run at large by order of board of county commissioners. If the owner's cattle are allowed to run at large by order of the board of county commissioners, the land-owner can not justify taking them up under the statute, without showing that the fence through which they broke was a lawful fence. *Clark v. Stipp*, 75 Ind. 114; *Blizzard v. Walker*, 32 Ind. 437.

Nor can he recover damages for injury done by them without the same showing. R. S. 1881, § 4835.

41.—Trespassing animals of adjoining occupants without partition fence.

[Caption and commencement.]

That the plaintiff and defendant each rented a piece of ground upon which to raise crops, which pieces of land adjoined, and were not separated by a fence or otherwise.

That after raising said crops, and while the plaintiff's grain was yet on the premises so occupied by him, the defendant turned into the premises occupied by him a lot of cattle and other stock of the defendant, which, without the fault of plaintiff, went upon lands leased by plaintiff, and ate up, trampled upon, and destroyed the crops of plaintiff thereon of the value of — dollars.

That it was not the duty of the plaintiff or the owner of the soil to erect a fence between said tracts of land.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[Signature.]

1. Where no partition fence is maintained. Either party may

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build or repair a partition fence and compel contribution. If neither does so, each must keep his cattle on his own land, and is liable if they trespass on the land of the other. *Myers v. Dodd*, 9 Ind. 290; *Rhodes v. Mummery*, 48 Ind. 216.

See also *Lowry v. Dutton*, 28 Ind. 473.

42.—Adjoining premises separated by partition fence.

[*Caption and commencement.*]

That on the — day of —, 18—, and prior thereto, the plaintiff and defendant owned and were in possession of adjoining tracts of land separated by a partition fence, of which said parties, by mutual agreement, assigned the north half to plaintiff as his part to keep in repair, and the south half to defendant as his part to keep in repair.

That the plaintiff at all times kept his part of said fence in good repair, but the defendant neglected to keep his part in good repair, in consequence whereof, on said day and at divers times since, certain horses, cattle, and other stock of the defendant, broke said part of said fence assigned to defendant to keep in repair, and entered plaintiff's land, and trod down, eat up, and destroyed crops of the plaintiff of the value of — dollars.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. When animals enter through plaintiff's part of the fence. If cattle of defendant enter through that part of the fence assigned to the plaintiff to keep in repair, he must show that his part of the fence was "such as good husbandmen generally keep." *R. S. 1881, §§ 4834, 4848; Hinshaw v. Gilpin*, 64 Ind. 116; *Baynes v. Chastain*, 68 Ind. 376.

43.—Cattle injured by railroad—Common law liability.

[*Caption and commencement.*]

That on the — day of —, the defendant controlled and managed a certain railroad, with locomotive and cars, in the county of —, State of Indiana.*

That at said date the plaintiff was possessed of the following cattle [*describe them*], of the value of — dollars, which cattle, at said time and place, strayed on the track of said railroad, and the defendant so carelessly and negligently ran and managed its cars and locomotive that the same was run against and over said cattle, and destroyed the same, without any fault on plaintiff's part, to plaintiff's damage — dollars, for which he asks judgment. [Signature.]

1. Common law liability. The common law liability arises from negligence on the part of the defendant and the absence of contributory negligence on the part of the plaintiff; and the question whether the road was fenced or not is immaterial. *The Pittsburg, etc., R. R. Co. v. Stuart*, 71 Ind. 500; *Cincinnati, etc., Ry. Co. v. Hiltzhauer*, 99 Ind. 486.

44.—Omission to fence—Statutory liability.

[*Caption and commencement.*]

[*Follow Form 43 to * and continue.*] That defendant, at said time and place, had neglected and failed to maintain [construct] a fence [or, a fence sufficient to turn stock], [or, a cattle-guard where the — road used by the public crosses said railroad, sufficient to prevent stock from going upon such railroad].

That on said day plaintiff owned and was possessed of the following cattle [*describe them*], of the value of — dollars, which cattle, then and there, by reason of the failure of said defendant to fence, strayed upon the line of said railroad, and were run against and killed by a locomotive and cars managed by defendant's servants, without any fault on plaintiff's part, to plaintiff's damage — dollars, for which he demands judgment. [Signature.]

1. Railroads bound to fence, where. The statute, if literally construed, would require railroads to be fenced their entire length, in order to avoid liability. *R. S. 1881, § 4031.*

But the supreme court has engrafted upon the statute certain exceptions, in order "to promote the public good by enabling the corporations to discharge their duty to the public," and the exceptions exist only where a necessity is shown. *The Wabash, etc., Ry. Co. v. Fretts*, 96 Ind. 450, and cases cited; see also note to § 4031 *R. S. 1881*; *The Wabash Ry. Co. v. Forshee*, 77 Ind. 158; *Evansville, etc., R. R. Co. v. Willis*, 93 Ind. 507; *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91; *The Wabash, etc., Ry. Co. v. Nice*, 99 Ind. 152; *Barister v. The Pennsylvania Co.*, 98 Ind. 220; *The Louisville, etc., Ry. Co. v. Hurst*, 98 Ind. 330; *Louisville, etc., Ry. Co. v. Shanklin*, 98 Ind. 573.

2. Burden of proof. That the railroad was not fenced at the point where the stock entered must be shown by the plaintiff; that it was not the duty of the company to fence at such point is matter of defense. *The Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426; *The Louisville, etc., R. R. Co. v. Hall*, 93 Ind. 245.

3. Necessary allegations. *Louisville, etc., Ry. Co. v. Peck*, 99 Ind. 68; *Wabash, etc., R. R. Co. v. Forshee*, 77 Ind. 158; *Evansville, etc., R. R. Co. v. Tipton*, 101 Ind. 197.

4. In justice's court. It is held that a complaint in a justice's court is not bad for a failure to allege that the road was not fenced. *The Indianapolis, etc., R. R. Co. v. Sims*, 92 Ind. 496; *The Louisville, etc., Ry. Co. v. Argenbright*, 98 Ind. 254.

5. Contributory negligence. *The Indianapolis, etc., Ry. Co. v. Caudle*,

60 Ind. 112; *The Wabash etc., Ry. Co. v. Nice*, 99 Ind. 152; *Lyons v. The Terre Haute, etc., R. R. Co.*, 101 Ind. 419.

45.—Willful injury to property.

[*Caption and commencement.*]

[*Follow Form 43 to *, and continue*]. That the defendant, on said day, in said county and state, knocked down and killed two steers, of the value of — dollars, owned and possessed by the plaintiff, by then and there, by its servants, negligently, carelessly, and willfully running its locomotive and train of cars on said road upon and over said cattle, to the plaintiff's damage — dollars, for which he demands judgment. [Signature.]

1. **Injury must be willfully done.** If the company has complied with the law in fencing its road, it can only be made liable by showing that the act was willfully done, or that the injury was the result of negligence, and without the fault of plaintiff. *The Pittsburg, etc., R. R. Co. v. Stuart*, 71 Ind. 500; *The Indianapolis & C. R. R. Co. v. Relty*, 30 Ind. 261.

SECTION IX.

ASSAULT AND BATTERY.

46.—For assault and battery.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Complaint.
C. D. }

The plaintiff complains of the defendant, and alleges:

That on the — day of —, 18—, the defendant assaulted and beat the plaintiff, whereby he is damaged in the sum of — dollars.

Wherefore, the plaintiff demands judgment for — dollars.

E. F.,

Attorney for Plaintiff.

47.—With special damages.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant assaulted the plaintiff, and struck him in the face several heavy blows, and tore

the clothes, of the value of — dollars, from his person and destroyed them, and broke his arm, and wounded him with a knife.

Whereby plaintiff became, and is, and for a long time will be, lamed and sick, and was disabled from attending to his business for — weeks thereafter, and was compelled to pay — dollars for medical attendance and nursing, to his damage — dollars, for which he demands judgment.

[Signature.]

1. Need not allege the assault and battery to be unlawful.
Benson v. Bacon, 99 Ind. 156.

48.—Expulsion of passenger from cars.

[Caption and commencement.]

That on the — day of —, 18—, the defendant owned and operated a railroad, and was a common carrier of passengers between — and —.

That the plaintiff purchased a ticket from the defendant entitling him to ride as a passenger from — to —, and while so riding, defendant assaulted the plaintiff, and ejected him from its cars at —, before reaching the end of his said journey.

[If plaintiff had no ticket: That on said day, at —, the defendant, with unnecessary violence, assaulted and ejected plaintiff from its cars].

[Special damages, if any, may be alleged, as in Form 47].

Wherefore, etc.

[Signature.]

1. Expulsion, when justifiable. R. S. 1881, §§ 3921, 3922, and notes; *The Indianapolis, etc.*, R. R. Co. v. *Milligan*, 50 Ind. 392; *Faulkner v. The Ohio, etc.*, R. R. Co., 55 Ind. 369; *The Baltimore, etc.*, R. R. Co. v. *McDonald*, 68 Ind. 316.

49.—Husband for assault on wife.

[Caption and commencement.]

That on the — day of —, 18—, the defendant assaulted and beat A. B., the wife of the plaintiff, whereby she became sick from that time until the — day of —, 18—, during all which time plaintiff was deprived of her society and of her services in the management of his domestic affairs, and was compelled to expend — dollars for nursing and medical attendance for his said wife, to his damage — dollars, for which he demands judgment.

[Signature.]

1. Who may sue for injury to wife. The husband and wife may

join in an action for injury to the wife. R. S. 1881, § 254; ante, vol. 1, §§ 110, 111, 114.

But the husband has his separate action for damages for loss of services and expenses, in which the wife need not join. Ante, vol. 1, § 114.

And the wife may sue alone for injury to her person. R. S. 1881, § 5131.

See HUSBAND AND WIFE, post, p. 163.

50.—Assault and battery and false imprisonment.

[Caption and commencement.]

That on the — day of —, 18—, defendant assaulted and beat the plaintiff, and imprisoned him [gave him in custody of a policeman], [forced him to go with him to a police station, and there caused his imprisonment] on a false charge of —, for the space of — hours [days].

[If there are special damages, allege them, e. g.: Whereby plaintiff became sick, and was compelled to expend — dollars for medical services, and was also greatly injured in his good name and credit, and detained from his business — days, and compelled to expend — dollars in attorney's fees and expenses in procuring his discharge], to his damage — dollars, for which he demands judgment. [Signature.]

1. Distinction between false imprisonment and malicious prosecution. False imprisonment is an imprisonment *without legal process*. Malicious prosecution must be one upon *legal process*, and with malice and without probable cause. *Colter v. Lower*, 35 Ind. 285; *Boaz v. Tait*, 43 Ind. 60; *Burt v. Pyle*, 89 Ind. 398.

2. Unnecessary allegations. It is not necessary to allege in the complaint that the defendant acted either wrongfully or maliciously in causing the imprisonment, or that he acted without probable cause. *Boaz v. Tait*, 43 Ind. 60; *Gallimore v. Ammerman*, 39 Ind. 323; *Carey v. Sheets*, 60 Ind. 17.

That the act was lawfully done is matter of defense. *Carey v. Sheets*, 60 Ind. 17.

See FALSE IMPRISONMENT, post, p. 152.

ATTORNEY AND CLIENT. See *Malpractice*, p. 214.

SECTION X.

BAILMENTS.

51.—Loss or non-delivery of articles bailed.

[*Caption and commencement.*]

That on the — day of —, 18—, at the request of defendant, plaintiff delivered to him the following goods, the property of plaintiff [*describe them*], of the value of — dollars, to be by defendant [*state the purpose, e. g., safely kept; or, securely loaded on board the steamboat —*].

[*If there was a consideration, state it, e. g., for the consideration of — dollars then paid; or, for a reasonable reward to be paid*], and the defendant then accepted and received said goods for the purpose aforesaid.

That defendant did not safely keep [*or, securely load, etc.*] said goods, but so negligently stored the same, that by the negligence of defendant they were stolen [*destroyed*], [*lost*].

[*Or, that defendant did not load said goods on board the steamboat —, but negligently and purposely retained the same in his own possession. That on the — day of —, plaintiff demanded a return of said goods, but defendant refused to deliver the same, and has converted them to his own use.*]

That plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [*Signature.*]

1. Negligence or misconduct must be shown. *Conwell v. Smith*, 8 Ind. 530; *The New Albany, etc., R. R. Co. v. Campbell*, 12 Ind. 55.

2. Conversion, measure of damages. *The Bank of the State v. Burton*, 27 Ind. 426.

52.—Against hirer of horse and buggy.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff let to hire for reward [*or, if so, lent gratuitously*] a horse and buggy of plaintiff's, of the value of — dollars, to defendant, to go from — to —, and back again, and delivered the same to defendant for that purpose.

That defendant drove said horse and buggy so immoderately, and

used the same so negligently and imprudently, that said horse was injured in [*state how*], and afterward, on the — day of —, 18—, died, and said buggy was destroyed [*or, if buggy was damaged, state how, and amount of damage done. If money was expended for repairing same, this should be stated*].

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [*Signature.*]

53.—Loss of pledge or pawn.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff delivered to defendant the following articles, the property of the plaintiff [*describe them*], of the value of — dollars, by way of pledge as security for the loan of — dollars, then and there loaned by defendant to plaintiff, in consideration of interest thereon to be paid, said loan to be repaid within — days, in default of which said goods were to be sold by defendant.

That defendant negligently failed to take due and proper care of said goods, whereby the same were lost [*or, damaged, stating amount of injury*], [*or, defendant, wrongfully and without the consent of the plaintiff, sold said goods before the said day for the repayment of said loan*].

That on the — day of —, 18—, plaintiff tendered to defendant the said amount so borrowed, with interest thereon, to wit, — dollars, and demanded a redelivery of said goods, which was refused, and said goods have not been returned to plaintiff.

Whereby plaintiff was damaged — dollars, for which he demands judgment [*or, that plaintiff incurred — dollars expense in recovering said goods, wherefore plaintiff demands judgment for — dollars*]. [*Signature.*]

54.—Injury to property bailed.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was carrying on the trade of a watchmaker and jeweler.

That plaintiff delivered to him a certain watch, of the value of —, to be repaired, for a reasonable compensation to be paid, and the defendant accepted and received the same for that purpose, and undertook to use due and proper care, and repair the same in a skillful and workmanlike manner.

That the defendant did not repair said watch in a skillful and work-

manlike manner, but did the same so negligently and unskillfully that the same was and is entirely worthless.

[Or, was greatly injured (*state how*), to the amount of — dollars].

Whereby plaintiff was injured in the sum of — dollars, for which he demands judgment. [Signature.]

55.—To account and redeem

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff, at the request of the defendant, delivered to him the following securities [*describe them*], as security for credits and advances, and balances on mutual accounts to be thereafter had between said parties; and said parties have had mutual dealings since, the items of which the plaintiff is unable to state.

That on the — day of —, 18—, the plaintiff applied to the defendant for a settlement and accounting, and offered to produce his books of account, and to compare and adjust said accounts, and offered to pay any balance found due, and demanded a return of said property, on such payment.

That defendant refused to produce his books of account, or to adjust and settle said mutual accounts, or to restore said property.

Wherefore, plaintiff prays that an account may be taken between him and defendant of said mutual accounts, and also of any income or profits had on said property by the defendant, and that the plaintiff be allowed to redeem said property by payment of any balance found due against him, and for all other proper relief. [Signature.]

56.—Foreclosure of lien on pledge.

[Caption and commencement.]

That on the — day of —, 18—, in consideration of the loan of — dollars of that date by plaintiff to defendant, to be repaid on the — day of —, 18— [*or, one year thereafter*], defendant, as a pledge to secure the repayment of the same, delivered to plaintiff the following property and securities [*describe them*], and the same are still in the possession of the plaintiff.

That said debt is now due and unpaid, and the defendant is indebted to the plaintiff thereon in the sum of — dollars.

Wherefore, the plaintiff demands judgment for — dollars, and that said property and securities, or so much thereof as may be necessary to pay plaintiff's judgment and costs, and accruing costs, may

be ordered sold, and the proceeds of the sale be applied to the payment thereof, and in case said property and securities do not realize sufficient to pay the same, that plaintiff have execution for the balance, and for all other proper relief. [Signature.]

1. Is foreclosure the proper remedy? If the right to sell and realize the amount due is given the pledgee, no necessity for a foreclosure exists. Whether such a proceeding can be maintained under any circumstances, especially where the thing pledged is commercial paper, may be doubted. But the right of a court to order a sale for the satisfaction of the debt is recognized in some of the cases, *under special circumstances*, as, for example, where the pledgor is away, and can not be notified of the sale. *Strong v. Nat'l Mech. B'king Ass'n*, 45 N. Y. 718; *Donehoe v. Gamble*, 38 Cal. 340; *Wheeler v. Newbould*, 5 Duer, 29; *Brown v. Ward*, 3 Duer, 660; *Atlantic Fire and Marine Ins. Co. v. Boies*, 6 Duer, 583; *Ogden v. Lathrop*, 1 Sweney (N. Y.), 643; *Vanpell v. Woodward*, 2 Sandf. Ch. 143; *Robinson v. Hurley*, 11 Iowa, 410.

The ground taken in some of the cases cited is that mercantile paper can not be sold by the pledgee without action, or under a decree of court, his only right being to collect and apply the money; and this would seem to be the reasonable rule.

SECTION XI.

BANKS.

57.—Neglect to present or protest note or bill.

State of Indiana, Switzerland County.

In the Switzerland Circuit Court, May Term, 1885.

Elijah Waltz

v.

} Complaint.

The First National Bank of Vevay.

The plaintiff complains of the defendant, and alleges:

That on the — day of —, 18—, the defendant received from plaintiff, who was a depositor at defendant's bank, a promissory note, the property of plaintiff, calling for — dollars, dated —, 18—, due in — days after date, made by —, payable to —, and indorsed by — and —.

That defendant, in consideration of plaintiff's leaving said note with it for collection, and of plaintiff's trust and confidence in defendant [if there was any other consideration paid or promised, state it], accepted the same for collection, and agreed to use due diligence in duly demanding payment,* and in default thereof, taking due steps to charge the indorsers.

That defendant neglected to make due presentment of said note to the maker [or, said note was not paid by the maker, but defendant negligently omitted to give due notice thereof to said indorsers, or either of them], and said maker is insolvent, and said note can not be collected from him, by reason whereof plaintiff has wholly lost the amount due on said note, to his damage — dollars, for which he demands judgment.

W. R. JOHNSTON,
Attorney for Plaintiff.

58.—Negligence to collect.

*Follow Form 57 to *, and continue*]. That said —, maker of said note, was ready and willing to pay said note on the day of maturity, and would have paid the same, but defendant negligently omitted to present the same for payment, and shortly thereafter, said maker became and still is insolvent, whereby plaintiff has wholly lost — dollars, the amount due on said note, for which he demands judgment.

[*Signature.*]

59.—Failure to protest commercial paper, and notify indorser.

[*Caption and commencement.*]

That defendants are partners, doing a general banking business at the City of Wabash, in the State of Indiana, under the firm name of the Citizens' Bank, and especially engaged in collections and remitting the proceeds, for hire.

That on the 23d day of September, 1875, the plaintiff placed in the hands of the defendants, as such partners, engaged in conducting said Citizens' Bank, for collection, and the defendants then and there undertook and faithfully promised to collect, for a reasonable compensation, a certain promissory note, made by John R. Wallace and Cornelius E. Deihl, by the firm name and style of Wallace & Deihl, payable to Dwight Loomis, at the said Citizens' Bank, then situated and doing business in the said City of Wabash, said note bearing date August 20, 1875, and due at sixty days after date, calling for one hundred and seventy-five dollars and ninety-five cents, payable at the defendant's bank and by said Loomis, who was at the time and still is solvent, for a valuable consideration, indorsed in writing on the back thereof, before maturity, to the plaintiff, a copy of which is filed herewith.

That the said note was not paid at maturity, or any part thereof.

That at the maturity of said note the same was in the possession of the defendants and of their bank for collection.

That the defendants and their said bank wholly failed and neglected to notify said indorser of the non-payment of said note, whereby the indorser became and is released from his liability to pay the same.

That on the 30th day of December, 1875, the firm of Wallace & Deihl, and each of them, became insolvent, and were adjudged bankrupts.

That said note is still due and unpaid, except the sum of seventy dollars.

That by reason of, etc.

Wherefore, etc.

M. H. KIDD,
Attorney for Plaintiff.

[*Copy of note and indorsements.*]

1. Form held sufficient. Form 59 is held to be sufficient. *Chapman v. McCrea*, 63 Ind. 360.

It may, however, be criticised as being unnecessarily long and as containing a copy of the note and its indorsements, which are certainly not the foundation of the action or properly a part of the complaint. *Ante*, vol. 1, §§ 415-420; *Locke v. Merchants' Nat Bk.*, 66 Ind. 353.

2. Bank bound to a faithful discharge of its duty. A bank, like any other agent, is bound to a faithful discharge of its duty, and is responsible in damages for negligence. *Tyson v. The State Bank of Indiana*, 6 Blkf. 225; *American Express Co. v. Haire*, 21 Ind. 4; *Chapman v. McCrea*, 63 Ind. 360; *The First Nat. Bk., etc., v. The First Nat. Bk., etc.*, 76 Ind. 561.

3. Measure of damages. For a failure to take the proper steps to charge the drawer or indorsers, in consequence of which the holder is unable to collect the amount of the bill, the measure of damages is the face of the bill, with interest. *The American Ex. Co. v. Haire*, 21 Ind. 4; *Chapman v. McCrea*, 63 Ind. 360.

4. Bankruptcy terminates agency. *The First Nat. Bk., etc., v. The First Nat. Bk., etc.*, 76 Ind. 561.

See BANK CHECKS, p. 47; NEGLIGENCE, post, p. 243; ANSWER, p. 347.

SECTION XII.

BILLS OF EXCHANGE.

60.—Payee against drawer—Non-acceptance.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

A. B. }
 v. } Complaint.
 C. D. }

The plaintiff complains of the defendant, and alleges:

That on the — day of —, 18—, at —, the defendant, by his bill of exchange, a copy of which is filed herewith, and made a part hereof, directed to D. G., requested the said D. G. to pay the plaintiff, or order, — dollars, — months after date, and the same was, on the — day of —, 18—, at —, presented to said D. G., and acceptance thereof demanded, which was refused. [*If a foreign bill, add: and said bill of exchange was then and there protested for non-acceptance*], of which defendant had due notice, but did not pay the same.

That there is now due and unpaid thereon the sum of — dollars, for which plaintiff demands judgment. [Signature.]

[Copy of bill of exchange.]

1. **What constitutes a bill of exchange.** Spurgin v. McPheeters, 42 Ind. 527; Mills v. Kuykendall, 2 Blkf. 47; Greenhow v. Boyle, 7 Blkf. 56; Glenn v. Noble, 1 Blkf. 104; Burnheisel v. Field, 17 Ind. 609; Sinclair v. Johnson, 85 Ind. 527; Griffin v. Kemp, 46 Ind. 172.

2. **Foreign bill, what is.** State Bank of Indiana v. Hayes, 3 Ind. 400; State Bank v. Rodgers, 3 Ind. 53.

3. **Accommodation drawer of bill surety of payee.** When the bill is drawn for the accommodation of the payee, the drawer is a mere surety, and as between them their true relation may be shown by parol. Lacy v. Lofton, 26 Ind. 324; See also Kealing v. Vansickle, 74 Ind. 529.

4. **Date of giving notice need not be alleged.** Henshaw v. Root, 60 Ind. 220.

61.—Indorsee against drawer—Non-acceptance.

[Caption and commencement.]

That on —, at —, the defendant, by his bill of exchange, a

copy of which is filed herewith, and made part of this complaint, requested G. H. to pay E. F. — dollars, — months after date.

That E. F., on —, assigned the same to plaintiff by indorsement.

That plaintiff, on —, presented said bill to G. H., who refused to accept the same, of which the defendant, at the time, had due notice.

That said bill is due and wholly unpaid.

Wherefore, etc.

[Signature.]

[Copy of bill.]

1. Presentment necessary to render drawer liable, or sufficient excuse must be alleged. *Goings v. Chapman*, 18 Ind. 194; *Dumont v. Pope*, 7 Blkf. 367.

62.—Payee against acceptor—Non-payment.

[Caption and commencement.]

That on —, at —, E. F., by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested the defendant to pay plaintiff — dollars, — days after date.

That on the — day of —, 18—, the defendant accepted the same.

That on the — day of —, 18—, the plaintiff presented said bill to the defendant for payment, which was refused.

That the same is now due and wholly unpaid.

Wherefore, etc.

[Signature.]

[Copy.]

1. Presentment for payment, when must be made. *Glenn v. Noble*, 1 Blkf. 104; *Harbison v. The Bank of the State of Indiana*, 28 Ind. 133; *Dumont v. Pope*, 7 Blkf. 367.

2. "Duly presented" not sufficient. It is not sufficient to allege the conclusion that the bill was "duly presented." The date of presentment must be stated. *Ante*, vol. 1, § 394.

3. Complaint must show title. It must appear from the allegations of the complaint that the plaintiff has a right to maintain an action on the bill. *Ante*, vol. 1, § 413; *Richardson v. Snider*, 72 Ind. 425.

63.—Indorsee against acceptor—Non-payment.

[Caption and commencement.]

That on —, 18—, at —, E. F., by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested the defendant to pay G. H., or order, — dollars, — days after sight.

That the defendant, on the — day of —, 18—, accepted said bill.

That the said G. H. indorsed the same to plaintiff.

That on the — day of —, 18—, plaintiff presented said bill to the defendant for payment, which was refused.

That the same is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy.*]

64.—Drawer, payee, against acceptor—Non-payment.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff, by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested the defendant to pay plaintiff — dollars, — days after date.

That on the — day of —, 18—, the defendant accepted said bill.

That the same is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy.*]

1. Drawer may sue acceptor. Pickington v. Woods, 10 Ind. 432; Gamble v. Grimes, 2 Ind. 392.

65.—Drawer, not payee against acceptor—Non-payment.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff, by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested the defendant to pay E. F. — dollars, — days after date.

That the defendant, on the — day of —, 18—, accepted said bill.

That he did not pay the same when due, although payment was demanded at the maturity thereof.

That said bill was returned to the plaintiff, and he has been compelled to pay the same to the said E. F.

That the same is due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy.*]

66.—Indorsee against acceptor — Payable at particular place.

[*Caption and commencement.*]

That on the — day of —, 18—, E. F., by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested the defendant to pay E. F., or order, — dollars, — days after date.

That the defendant, on the — day of —, 18—, accepted the same, payable at the First National Bank of Vevay, Indiana, and not elsewhere.

That the said E. F. indorsed said bill of exchange to the plaintiff.

That the same was, on the — day of —, 18— [or, on the day of its maturity], presented for payment at the said First National Bank of Vevay, Indiana, and payment refused.

That said bill was then and there protested for non-payment, of all which the defendant then and there had due notice.

That the same is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy.*]

1. Acceptor is the principal debtor. The acceptor is bound as the principal debtor, and is bound to the payee, although his acceptance was for the accommodation of the drawer, and there were no funds of the drawer in his hands. *Lambert v. Sandford*, 2 Blkf. 137; *Marsh v. Low*, 55 Ind. 271.

2. What amounts to an acceptance. *Beach v. The State Bank*, 2 Ind. 488; *Stockwell v. Bramble*, 3 Ind. 428; *Bird v. McElvaine*, 10 Ind. 40; *Miller v. Neihaus*, 51 Ind. 401; *The National Bank of Rockville v. The Second National Bank of Lafayette*, 69 Ind. 479; *The Louisville, etc., Ry. Co. v. Caldwell*, 98 Ind. 245.

3. Who bound by acceptance. *Gamble v. Grimes*, 2 Ind. 391; *Tousey v. Taw*, 19 Ind. 212.

4. Effect of general acceptance. Where the place of payment is fixed by the bill, a general acceptance binds the acceptor to pay at that place. *Alden v. Barbour*, 3 Ind. 414.

67.—Indorsee against drawer being indorser — Payable after sight.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested E. F. to pay the defendant, or order, — dollars, — days after sight.

That the said E. F. then [*or, on the — day of —, 18—*] saw and accepted the same.

That the defendant indorsed said bill to J. K., who indorsed the same to the plaintiff.

That on the — day of —, 18—, said bill was duly presented to the said E. F. for payment, which was refused, and the same was then and there protested for non-payment, of all which the defendant then had notice.

That the same is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bill.*]

[*Signature.*]

1. Notice of protest, what sufficient. *Palmer v. Whitney*, 21 Ind. 58.

68.—Indorsee against drawer, Indorsers and acceptor, on inland bill of exchange.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, C. D., by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested the defendant, E. F., to pay the defendant, G. H., or order, — dollars, — days after date.

That on the — day of —, 18—, the said E. F. accepted the same.

That the defendant, G. H., by indorsement in writing, a copy of which is filed herewith, and made part hereof, assigned said bill of exchange to the plaintiff.

That on the day of the maturity of said bill, the same was presented to the defendant, E. F., for payment, which was refused, of all which the defendants then had notice.

That the said bill is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of bill and indorsement.*]

1. Drawer and indorser may be joined as defendants. *Ante*, vol. 1, § 128; *R. S.* 1881, § 5516.

2. Copy of indorsement necessary. Where it is sought to bind an indorser, the indorsement, or a copy, must be made a part of the complaint, as it is the foundation of the action against him. *Ante*, vol. 1, § 418.

And the copy of the indorsement must be made a part of the complaint by the proper reference to it. *Sinker, Davis & Co. v. Fletcher*, 61 Ind. 276.

69.—Indorsee against drawer—Payable at place certain.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his bill of exchange, a copy of which is filed herewith, and made a part hereof, requested E. F. to pay G. H. — dollars, — days after date, payable at Rising Sun, Indiana.

That the said E. F. accepted the said bill, payable at the National Bank of Rising Sun, Indiana.

That the said G. H. indorsed the same to the plaintiff.

That on the — day of —, 18— [*or, on the day of its maturity*], said bill was presented [at the said National Bank of Rising Sun, Indiana], and payment demanded, which was refused, of which the defendant then and there had notice.

That said bill is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of bill.*]

1. Where demand must be made. The complaint need not allege a demand at any particular place, although a particular place of payment is fixed by the contract. R. S. 1881, § 368; ante, vol. 1, § 287.

**70.—Indorsee against drawer—No funds in drawee's hands
—Failure to notify drawer.**

[*Caption and commencement.*]

That the defendant, on the — day of —, 18—, by his bill of exchange, of which a copy is herewith filed, and made a part hereof, requested E. F. to pay the defendant, or order, — dollars, — days after date.

That defendant indorsed said bill to the plaintiff*.

That the same was, on the — day of —, 18—, presented to said E. F. for acceptance, which was refused.

That on the — day of —, 18—, the same was presented to the drawee for payment, which was refused.

That at the time when said bill was drawn, and from thence until payment thereof was refused, the defendant had no moneys or effects in the hands of the said E. F., nor did he expect to have, or that said bill would be accepted or paid on presentment.

That defendant has sustained no damage by a failure to give notice of the refusal to accept or pay said bill.

That the same is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy.*]

71.—Indorsee against drawer—Excuse for non-presentment—No effects.

[Caption and commencement.]

[Follow Form 70 to *, and continue]. That said bill was not presented for acceptance or payment, for the reason that the defendant had no effects in the hands of said E. F., either at the time of drawing said bill or at any time thereafter.

That said bill is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy.]

72.—Same—Countermand by drawer.

[Caption and commencement.]

[Follow Form 70 to *, and continue]. That on or about the — day of —, 18—, before said bill was presented for acceptance [or, became due], the said drawer countermanded the same by instructing the said E. F. not to accept or pay [or, if payable at sight, not to pay the same]. Wherefore, the same was not presented.

That said bill is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy.]

73.—Same—Demand and notice waived.

[Caption and commencement.]

[Follow Form 70 to *, and continue]. That the defendant [drawee or indorser], before presentment for acceptance [or, before the bill became due], waived the presentation of the same for acceptance [or, payment], and notice of non-acceptance [or, non-payment] thereof.

That said bill is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy bill, and if against indorser, the indorsement also.]

1. What will amount to a waiver of protest or notice. Neal v. Wood, 23 Ind. 523; Gordon v. Montgomery, 19 Ind. 110; Henderson v. Ackel-mire, 59 Ind. 540; Pollard v. Bowen, 57 Ind. 232.

2. Waiver in body of bill enters into the contract of the indorser. Gordon v. Montgomery, 19 Ind. 110; Lowry v. Steele, 27 Ind. 168; Rooker v. Morris, 61 Ind. 286.

74.—Same—Drawee could not be found.

[Caption and commencement.]

[Follow Form 70 to *, and continue]. That on the — day of —,

18— [or, at maturity, *if for non-payment*], diligent inquiry for the said drawee [or, acceptor, *if accepted*] was made by [*state what was done constituting diligence*], in order to present said bill to him for acceptance [payment], but he could not be found, and the same was not accepted. [*If a foreign bill, add: and was thereupon duly protested for non-acceptance [non-payment], of all which said drawer and indorser then had notice.*

That said bill is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of bill and indorsement.]

75.—Same—Death of drawee before maturity.

[Caption and commencement.]

[Follow Form 70 to *, and continue]. That at the maturity of said bill, it was duly presented at — [acceptor's address, or at place of payment, *if specified*], but said acceptor was then deceased, and there was no executor or administrator of his estate appointed, nor any person who would pay the bill [*if a foreign bill, add: and said bill was thereupon duly protested*], of all which said [drawer and indorsers] then had due notice.

That said bill is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of bill, and if against indorser, the indorsement.]

76.—Indorsee against indorser—Non-payment by acceptor.

[Caption and commencement.]

That on the — day of —, 18—, one A. B., by his bill of exchange, a copy of which is filed herewith, and made a part of this complaint, requested C. D. to pay E. F., or order, — dollars, two months after date.

That the said E. F., by his indorsement thereon, a copy of which is filed herewith, and made a part hereof, assigned said bill to the plaintiff.

That on the — day of —, 18—, the said drawee accepted said bill.

That on the — day of —, 18— [or, at its maturity], the same was duly presented for payment and refused [*if a foreign bill, add: and said bill was thereupon duly protested*], of all which the defendant then had due notice, but did not pay the same.

That said bill is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Copy of bill and indorsement.]

[Signature.]

77.—Indorsee against indorser—Non-acceptance.

[*Caption and commencement.*]

[*Follow Form 76 to *, and continue*]. That on the — day of —, 18—, said bill was duly presented to the drawee for acceptance, which was refused [*if a foreign bill, add: and said bill was thereupon duly protested for non-acceptance*], of all which the defendant then and there had due notice, but did not pay the same.

That said bill is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy bill and indorsement.*]

78.—Drawee against acceptor—Payable on contingency.

[*Caption and commencement.*]

That on the — day of —, 18—, one E. F., by his bill of exchange, a copy of which is filed herewith, and made a part of this complaint, requested the defendant to pay to the plaintiff, or order, the sum of — dollars, — months after date.

That the defendant accepted the same, payable when he should receive the debt then due him from A. B. [*or state any other contingency upon which payment was to be made*].

That the defendant has since received said debt due him from A. B. [*or state the happening of other contingency, if any*], but has failed and refused to pay said bill, or any part of it, and the same is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy.*]

79.—Accommodation acceptor against drawers.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendants were partners, doing business under the firm name and style of A. B. & Co.

That, as such partners, they, on said day, by their bill of exchange, a copy of which is herewith filed, and made a part of this complaint, requested the plaintiff to pay C. D., or order, — dollars, — days after date.

That the plaintiff accepted the same for the accommodation of the defendants, and as their surety, and without any other interest therein, and the said C. D. indorsed the same to E. F.

That at the maturity thereof, the same not having been paid by

the defendants, the plaintiff was compelled to and did pay said bill, amounting to — dollars.

That the plaintiffs have not paid said sum, or any part thereof, and the same is now due and unpaid

Wherefore, etc.

[*Signature.*]

[*Copy of bill.*]

80.—Accommodation payer against drawer.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his bill of exchange, a copy of which is filed herewith, and made a part of this complaint, requested the plaintiff to pay E. F. — dollars, — days after date.

That at the time said bill was drawn, and from thence until the present time, the defendant had no effects in plaintiff's hands out of which to pay said bill, or any part thereof.

That upon the presentation of the same, to wit, on the — day of —, 18—, the plaintiff, for the accommodation of the defendant, paid and took up said bill.

That the same has not been paid to the plaintiff, but is still due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy bill.*]

1. Accommodation drawee is, as between himself and the drawer, a mere surety. The presumption is that the drawee who accepts a bill has funds of the drawer with which to pay it, but, as between the two, the presumption is not conclusive, and the true relations of the parties may be shown by parol. *Dickerson v. Turner*, 15 Ind. 4; *Harshman v. Armstrong*, 43 Ind. 126; *Lacy v. Lofton*, 26 Ind. 324; *Dunn v. Sparks* 7 Ind. 490.

81.—Promise to accept.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of [*state consideration*], defendant promised plaintiff to accept and pay all drafts drawn by him on them on account of certain contracts in which said parties were interested.

That on the — day of —, 18—, plaintiff drew a draft on account of said contracts on defendant, in favor of E. F., for — dollars, payable — months after date, and received from the said payee the full value of the same.

That the same was, on the — day of —, 18—, duly presented

to the defendant, but he refused to accept or pay the same; in consequence whereof, plaintiff was compelled to pay said draft, with costs of protest, — dollars, and damages, — dollars, of all which the defendant, at the time, had notice, and though often requested, has failed to pay plaintiff, to his damage — dollars.

Wherefore, the plaintiff demands judgment for — dollars, the amount of his damages and interest. [Signature.]

SECTION XIII.

BANK CHECKS.

82.—Payee against drawer.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his check, a copy of which is filed herewith, and made a part of this complaint, requested the — Bank to pay to plaintiff, or bearer, — dollars, and delivered the same to plaintiff.

That plaintiff, on the — day of —, 18—, presented said check to said bank, and demanded payment, which was refused, of which the defendant, on the — day of —, 18—, had notice.

That said check is now due and unpaid.

Wherefore, etc.

[Signature.]

[*Copy of check.*]

1. Difference between check and bill of exchange. *Griffin v. Kemp*, 46 Ind. 172; *Glenn v. Noble*, 1 Blkf. 104; *Sinclair v. Johnson*, 85 Ind. 527; *Harrison v. Wright*, 100 Ind. 515.

2. Protest not necessary. *Griffin v. Noble*, 46 Ind. 172; *Pollard v. Bowen*, 57 Ind. 232; *Sinclair v. Johnson*, 85 Ind. 527; *Henshaw v. Root*, 60 Ind. 220.

3. Payment, when must be demanded. If a check is made payable on a day certain, it must be presented for payment at maturity, as in case of bills of exchange. If time of payment is not fixed, presentment must be during banking hours and within a reasonable time. *Glenn v. Noble*, 1 Blkf. 104; *Gallagher v. Raleigh*, 7 Ind. 1.

But presentment may be excused. If so, the facts constituting the excuse must be alleged. *Pollard v. Bowen*, 57 Ind. 232; *Fletcher v. Pierson*, 69 Ind. 281.

4. Protest not proper part of complaint, and can not aid its averments. *Pollard v. Bowen*, 57 Ind. 232.

5. Notice of non-payment must be alleged or excused. *Griffin*

v. Kemp, 46 Ind. 172; *Pollard v. Bowen*, 57 Ind. 232; *Sinclair v. Johnson*, 85 Ind. 527; *Spangler v. McDaniel*, 3 Ind. 275; *Blankenship v. Rogers*, 10 Ind. 333.

6. Effect of failure to notify drawer. The failure to notify the drawer does not discharge him from liability on the check, but entitles him to such damages as he may have sustained by reason of such failure. *Griffin v. Kemp*, 46 Ind. 172; *Henshaw v. Root*, 60 Ind. 220; *Harrison v. Wright*, 100 Ind. 515.

And an allegation in the complaint that the drawer had withdrawn his funds from the hands of the drawee, and was not damaged by the failure to give notice, has been held to be sufficient, in lieu of the allegation of presentment and notice. *Spangler v. McDaniel*, 3 Ind. 275; *Blankenship v. Rogers*, 10 Ind. 333; *Fletcher v. Pierson*, 69 Ind. 281.

7. Date of giving notice need not be alleged. *Henshaw v. Root*, 60 Ind. 220.

8. The check is the foundation of the action. *Griffin v. Kemp*, 46 Ind. 172; *Pollard v. Bowen*, 57 Ind. 232; *Henshaw v. Root*, 60 Ind. 220.

83.—Payee against drawee.

[*Caption and commencement.*]

That on the — day of —, 18—, one E. F., by his check, a copy of which is filed herewith, and made a part of this complaint, requested the defendant to pay the plaintiff the sum of — dollars.

That on the — day of —, 18—, the defendant accepted said check, certified the same to be good, and charged the amount thereof to said E. F.

That on the — day of —, 18—, plaintiff presented the same to the defendant, and demanded payment thereof, which was refused.

That said check is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of check.*]

1. Must be acceptance to render drawee liable to payee. *The National Bank of Rockville v. The Second National Bank of Lafayette*, 69 Ind. 479; *Harrison v. Wright*, 100 Ind. 515.

2. What amounts to an acceptance. *Ante*, p. 40, note 2; *The National Bank of Rockville v. The Second National Bank of Lafayette*, 69 Ind. 479.

3. Certifying check by bank, effect of. By certifying a check, the bank agrees that the signature of the drawer is genuine, and that he has funds in the bank sufficient to pay it. *Parke v. Raser*, 67 Ind. 500.

84.—Drawer against drawee.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff had on deposit in the defendant's bank — dollars.

That on the — day of —, 18—, he drew his check on the defendant, requesting it to pay C. D., or bearer, — dollars.

That C. D. indorsed the said check to E. F., who indorsed the same to G. H.

That on the — day of —, 18—, the said G. H. presented said check to the defendant for payment, which was refused, whereby plaintiff was compelled to pay the same, to his damage — dollars, for which he demands judgment.

[*Signature.*]

85.—Indorsee against indorser.

[*Caption and commencement.*]

That on the — day of —, 18—, A. B., by his check, a copy of which is filed herewith, and made a part of this complaint, requested the National Bank of Rising Sun, Indiana, to pay the defendant, or order, — dollars.

That on the — day of —, 18—, the defendant, by his indorsement thereon, a copy of which is filed herewith, and made a part hereof, assigned said check to the plaintiff.

That on the — day of —, 18—, the plaintiff presented the same to said bank for payment, which was refused, of which the defendant then had notice.

That said check is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy check and indorsement.*]

1. Forged indorsement, effect of. *Indiana Nat'l Bank v. Holtsclaw*, 98 Ind. 85.

SECTION XIV.

PROMISSORY NOTES.

86.—Payee against maker.

[*Venue and court.*]

A. B. }
 v. }
 C. D. } Complaint.

The plaintiff complains of the defendant, and alleges :

That the defendant, by his note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars.

That said note is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

WILLIAM R. JOHNSTON,

[*Copy of note.*]

Attorney for Plaintiff.

1. Promise to pay need not be alleged. Where the note, or a copy, is set out, it shows a promise to pay, and the complaint is not bad for the want of an allegation that the maker promised to pay, though it is usually so pleaded. *Reynolds v. Baldwin*, 93 Ind. 57.

2. Must allege note to be due and unpaid. The complaint must show that the note is due and unpaid, but it is not necessary that it should be alleged in direct terms. *Ante*, vol. 1 §§ 363, 594.

3. What constitutes promissory note. *The City of Aurora v. West*, 22 Ind. 88; *National State Bank of Lafayette v. Ringel*, 51 Ind. 393; *Johnson School Township v. Citizens' Bank of Greenfield*, 81 Ind. 515.

4. Note is without force unless delivered. *Stringer v. Adams*, 98 Ind. 539.

87.—Payee against maker—For interest due.

[*Caption and commencement.*]

That on the — day of —, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars, — years after date, with — per cent per annum interest, payable annually.

That the first annual installment of said interest is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of note.*][*Signature.*]

1. Where more than one note is sued on—Exhibits. When two or more notes are sued on, they must be set out in separate paragraphs, and although of identical tenor, a copy of each must be filed with each paragraph. *Johnson School Township v. Citizens' Bank of Greenfield*, 81 Ind. 515.

88.—Payee against maker—Note providing for attorney's fee.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff, — months after date, the sum of — dollars and — per cent attorney's fee [*or, a reasonable attorney's fee*], for collecting the same. [That a reasonable fee for plaintiff's attorney in this action is — dollars.]

That said note is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of note.*]

1. Attorney's fee, when may be collected. R. S. 1881, § 5518; *Tuley v. McClung*, 67 Ind. 10; *Churchman v. Martin*, 54 Ind. 380; ante, vol. 2, § 1344.

2. Failure to allege value of attorney's fee. It is held that a cause will not be reversed for including the fee in the judgment, although the value of the fee is not alleged. *Roberts v. Comer*, 41 Ind. 475; *Glenn v. Porter*, 72 Ind. 525.

3. Void stipulation for does not affect validity of note. *Maynard v. Mier*, 85 Ind. 317.

89.—Payee against maker—Whole amount due on failure to pay part.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars, — years after date, with — per cent per annum interest, payable annually, the whole sum of principal and interest to become due and payable upon failure to pay any of said installments of interest, or parts thereof.

That the defendant has failed to pay the second installment of said interest, which fell due on the — day of —, 18—.

That said note is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of note.*]

90.—Payee against maker—Payable after sight, demand, or notice.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars, — days after sight [*or*, — days after demand], [*or*, — days after notice].

That on the — day of —, 18—, said note was duly presented to defendant, with notice that payment would be required according to its terms.

That said note is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of note.*]

1. Demand or notice, when must be alleged. Where a note is made payable *on demand*, it is due on the day of its date, and no demand need be alleged, but if it is made payable *after demand*, after sight, or after notice, such demand or notice must be given within a reasonable time, and it must be alleged in the complaint. Ante, vol. 1, § 260; Bates' Prac. and Par. 308; Brown v. McElroy, 52 Ind. 404.

In an action upon a certificate of deposit in a bank, it is held that a demand is necessary. Brown v. McElroy, 52 Ind. 404.

91.—Payee against maker—Excuse for not setting out copy of note.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his promissory note, promised to pay the plaintiff, six months after date, — dollars, with — per cent per annum interest from date until paid, waiving valuation and appraisement laws.

That plaintiff is unable to set out a copy of said note, or give a fuller description thereof, for the reason that the same is wrongfully in the possession of the defendant, who refuses to deliver it to the plaintiff, although requested so to do [*or*, is in the hands of A. B., who refuses to surrender the same to the plaintiff, or give him a copy thereof], [*or*, has been destroyed without the fault of plaintiff].

That said note is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

L. O. SCHROEDER,
Attorney for Plaintiff.

1. Excuse for not setting out note or copy. Peabody v. Peabody, 59 Ind. 556; Timmons v. Wiggins, 78 Ind. 297; Pattison v. Shaw, 82 Ind. 32.

2. Must show to whom note payable. In giving the substance of the note, if the complaint fails to show to whom the note was made payable, it is bad. *Timmons v. Wiggins*, 78 Ind. 297; *White v. Joy*, 13 N. Y. 83.

92.—Payee against maker—Payable in trade.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, by his note, a copy of which is filed herewith, and made a part of this complaint, promised to pay plaintiff — dollars in wheat, at — per bushel, on or before the — day of —, 18— [*or*, promised to pay plaintiff — dollars in good merchantable wheat, on the — day of —, 18—, at which time good merchantable wheat was worth — per bushel].

That plaintiff has been ready and willing at all times [*or*, was, on the — day of —, 18—, ready and willing] to receive said wheat.

That defendant has not delivered said wheat, or any part of it, to plaintiff's damage — dollars.

That said note is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Copy of note.]

[Signature.]

1. Demand at particular place need not be alleged. If the note is payable at a particular place, a demand at such place need not be alleged, but the defendant may show a readiness to perform at the time and place named in the note. *Ante*, vol. 1, § 387; *Hall v. Allen*, 37 Ind. 541.

93.—Payee against maker—Note payable in services.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars, six months after date, with the privilege of paying the same at any time before maturity, in sawing lumber, at fifty cents per 100 feet, the plaintiff to furnish logs out of which to saw said lumber.

That the plaintiff furnished to the defendant the logs out of which to saw said lumber, and in all things fully complied with the terms and conditions of said note, but the defendant wholly failed and refused to saw said lumber, or any part of it.

That said note is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[Copy of note.]

[Signature.]

1. When note payable in property or services becomes payable in money. The privilege of paying in services or property is for the benefit of the payor, and a failure on his part to so pay renders him liable to pay in money, and a money judgment may be recovered. *Duerron v. Bellows*, 1 Blkf. 217; *Mason v. Toner*, 6 Ind. 328; *Fretageat v. Owen*, 7 Blkf. 231; *Ireland v. Montgomery*, 34 Ind. 174; *Nipp v. Diskey*, 81 Ind. 214.

But where he can only render the services upon some act being done or material furnished by the payee, it is sufficient to show that he was ready and willing to pay in accordance with the terms of the note, and so notified the payee. *Nipp v. Diskey*, 81 Ind. 214.

So, where he is only bound by the terms of the note to render the services or furnish the property on demand, a demand must be shown before the money can be recovered.

2. Amount of recovery. It has been held that where a note was made payable in certain scrip, the measure of damages was the market value of the scrip at maturity, and the case of a note payable in money, with the privilege of payment in property, is distinguished from one payable in certain property absolutely. *Parks v. Marshall*, 10 Ind. 20; *Williams v. Jones*, 12 Ind. 561; *Pierce v. Spader*, 13 Ind. 458.

94.—Payee, surviving partner, against maker.

[*Venue and court.*]

A. B., surviving partner of the late firm of A. B. & Co.,	} Complaint.
v.	
C. D.	

The plaintiff complains of the defendant, and alleges:

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay A. B. & Co. — dollars, — months after date.

That the said firm of A. B. & Co. was composed of the plaintiff and one E. F.

That the said E. F. died on the — day of —, 18—, leaving the plaintiff the sole surviving member of said firm.

That plaintiff has made and filed a complete inventory of the estate of said firm, duly verified, and caused the same to be appraised; and also a list of all the liabilities of said firm at the time of the death of the said E. F., duly verified, and has given bond as required by law.

That said note is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollass.

[*Copy of note.*]

[*Signature.*]

95.—Husband and wife against maker of note to wife before marriage.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff, C. D., by her then name of C. G., — dollars, — months after date.

That at the time said note was executed, the plaintiff, C. D., was unmarried, but has since intermarried with the plaintiff, A. B., who is still her husband.

That said note is now due and unpaid.

[*Signature.*]

[*Copy of note.*]

1. Joinder of husband and wife as plaintiffs. Ante, vol. 1, § 110.

See HUSBAND AND WIFE, post, p. 163; ASSAULT AND BATTERY, ante, p. 29.

96.—Executor of payee against maker.

[*Venue and court.*]

A. B., executor of the last will and testament of C. D.,	} Complaint.
v.	
E. F.	

The plaintiff complains of the defendant, and alleges:

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay C. D. — dollars, on or before the — day of —, 18—.

That on the — day of —, 18—, in the county of —, State of Indiana, C. D. died, testate, and by his last will and testament appointed the plaintiff the executor thereof.

That on the — day of —, 18—, the plaintiff duly qualified and received his letters as such executor.

That said note is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of note.*]

1. Capacity to sue need not be shown. The statute dispenses with the necessity of a showing in the complaint of the appointment of an executor or administrator. R. S. 1881, § 2292; ante, vol. 1, § 368.

But a careful pleader will hardly be satisfied with his own complaint which fails to show, upon its face, any connection of the plaintiff with the cause of action.

97.—Surviving payee against maker.

[Caption and commencement.]

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff and one A. B. — dollars, — months after date.

That the said A. B. died on the — day of —, 18—.

That said note is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of note.]

98.—Indorsee against maker.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay A. B., or order, — dollars.

That the said A. B. indorsed the same to the plaintiff.

That said note is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of note.]

1. Indorsement need not be set out. Where the action is against the maker, the indorsement is not the foundation of the action, and need not be set out. *Fordyce v. Nelson*, 91 Ind. 447; *Fichelberger v. The Old Nat'l Bank*, 103 Ind. 401.

99.—Assignee by delivery against maker and assignor.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the defendant, —, — dollars.

That defendant, —, assigned and delivered said note to the plaintiff without indorsement, and said — is made a defendant, to answer as to said assignment.

That said note is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of note.]

1. Assignor a necessary party. Where the assignment is by delivery, or by a separate writing, the assignor is a necessary party defendant. *Ante*, vol. 1, §§ 131, 413.

But see as to note payable to bearer in a bank in this state. *Riley v. Schawacker*, 50 Ind. 592.

2. Note made payable to maker, or order. A note made payable to the maker, or order, can not be transferred by delivery. There must be an indorsement to give it effect. *Pickering v. Cording*, 92 Ind. 306; *Baldwin v. Shuter*, 82 Ind. 560.

100.—Indorsee against maker and indorsers—Note payable in a bank in this state.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, A. B., by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the defendant, C. D., or order, — dollars, at the First National Bank of Vevay, Indiana.

That the defendant, C. D., indorsed said note to the defendant, E. F., who indorsed the same to the plaintiff, copies of which indorsements are filed herewith, and made parts of this complaint.

That the plaintiff presented said note for payment at its maturity, and payment was refused, of which all the defendants then had due notice.

That said note is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy note and indorsements.*]

[*Signature.*]

1. Note payable in a bank in this state negotiable as inland bill of exchange. R. S. 1881, § 5506, and authorities cited in note; ante, vol. 1, §§ 128, 129.

But not if not made payable "*to order, or bearer.*" *Albright v. Griffin*, 78 Ind. 182; *Melton v. Gibson*, 97 Ind. 158.

The name of the bank must appear. If payable at *the* bank at a place named, although there is but one bank at the place named, it is not sufficient *Hardy v. Brier*, 91 Ind. 91.

2. Maker and indorsers may be joined in same action. R. S. 1881, § 5516; ante, vol. 1, § 128; *Overshiner v. Martin*, 87 Ind. 189.

It is otherwise in case of a note not negotiable by the law merchant. R. S. 1881, §§ 5504, 5516; ante, vol. 1, § 129.

3. Unnecessary allegations. *Hall v. Allen*, 37 Ind. 541; *Reynolds v. Baldwin*, 93 Ind. 57.

4. When due. (a.) *Note payable in bank.* Is not due until the expiration of the full three days of grace. R. S. 1881, § 5514; ante, vol. 1, § 256.

(b.) *Negotiable by statute.* Notes negotiable by statute are not entitled to days of grace. *Luce v. Shoff*, 70 Ind. 152.

(c.) "*When maker is able.*" Ante, vol. 1, § 261.

(d.) *On demand.* Ante, vol. 1, § 260; *Goodwin v. Hazzard*, 1 Ind. 514.

(e.) *Miscellaneous.* *Wade v. Darrow*, 15 Ind. 212; *Goodwin v. Hazzard*, 1 Ind. 514; *Walker v. Woollen*, 54 Ind. 164.

(f.) *When day of maturity is a holiday, are due the day previous.* R. S. 1881, § 5517.

5. When void in hands of innocent holder. *City of Aurora v. West*, 22 Ind. 88.

6. Bank named in note presumed to be within the state. Where the note is made payable at a bank without showing where the bank is located, it will be presumed to be within the state. *Clark v. Carey*, 63 Ind. 105; *Walker v. Woollen*, 54 Ind. 164.

7. Presumed to have been executed within state. *Clark v. Carey*, 63 Ind. 105; *Walker v. Woollen*, 54 Ind. 164.

8. Waiver of demand, protest, and notice. If the note contains a waiver of demand, protest, notice, or either of them, all subsequent parties are bound thereby, but such waiver does not change the relations of the parties. *Core v. Wilson*, 40 Ind. 204.

As to what will amount to waiver, see *BILLS OF EXCHANGE*, ante, p. 48.

Where the note contains the waiver, the copy of the note sufficiently shows it, and no allegation of such waiver is necessary in the body of the complaint.

9. Necessary allegations. *Coffing v. Hardy*, 86 Ind. 369.

101.—Indorsee against maker—Note lost before maturity.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay A. B. — dollars, — months after date, at the — Bank, at —, Indiana.

That on said day said A. B. indorsed said note to the plaintiff.

That before the maturity thereof said note was lost, and can not be found, although plaintiff has made diligent search therefor.

That the same was not indorsed by plaintiff.

That at the maturity of the same plaintiff tendered to defendant a good and sufficient bond, payable to him, and signed by plaintiff as principal, and C. D. as surety, with a penalty of — dollars, conditioned that plaintiff would save and keep defendant harmless against all suits or claims made by any person who might have obtained possession thereof, and thereupon demanded payment of said note, which was refused.

That said note is now due and unpaid.

That plaintiff brings said bond into court for the use and benefit of the defendant.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of note.*]

[*Signature.*]

1. Indemnity bond, when required. An indemnity bond is only re-

quired where the lost note is one governed by the law merchant and lost before maturity. *The National State Bank of Lafayette v. Ringel*, 51 Ind. 393; *Sloo v. Roberts*, 7 Ind. 128; *Elliott v. Woodward*, 18 Ind. 183; *Dean v. Speakman*, 7 Blkf. 817; *Depew v. Wheelan*, 6 Blkf. 485.

2. Complaint should show note has not been indorsed. *Sloo v. Roberts*, 7 Ind. 128; *Depew v. Wheelan*, 6 Blkf. 485.

102.—Indorsers, partners, against makers, partners.

[*Venue and court.*]

A. B. and C. D., partners,	} Complaint.
v.	
E. T., G. T. and I. T., partners.	

The plaintiffs complain of the defendants, and allege:

That the plaintiffs are partners, doing business under the firm name and style of A. B. & Co., and the defendants are partners doing business under the firm name of Thomas Brothers.

That on the — day of —, 18—, the defendants, by their promissory note, executed in their firm name, a copy of which is filed herewith, and made a part of this complaint, promised to pay E. F., or order, — dollars, — months after date.

That said E. F. indorsed said notes to the plaintiffs.

That the same is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of note.*]

1. Partners must sue and be sued in their individual names.

Ante, vol. 1, § 345; vol. 3, pp. 8, 9; *Hays v. Lanier*, 3 Blkf. 322; *Livingston v. Harvey*, 10 Ind. 218; *The Adams Express Co. v. Hill*, 43 Ind. 157.

103.—Indorsee of corporation against maker.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the San Diego Mercantile Company, at the First National Bank of San Diego, California, — dollars, — months after date.

That the said San Diego Mercantile Company was then and still is a corporation duly organized under the laws of the State of California.

That one E. F. Rockfellow was then and still is the treasurer of said company, and as such was authorized to sell and indorse notes and bills belonging to said company.

That the said E. F. Rockfellow, as such treasurer, indorsed said note to the plaintiff.

That said note is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of note.*]

[*Signature.*]

104.—Indorsee against indorser—Diligence against maker.

[*Caption and commencement.*]

That on the — day of —, 18—, one A. B., by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the defendant — dollars, — months after date [*or, on or before the — day of —, 18—*].

That the defendant, by his indorsement, which is filed herewith, and made a part of this complaint, assigned the same to plaintiff.

That the maker of said note did not pay the same at maturity.*

That on the — day of —, 18—, the plaintiff brought his action on said note against said maker, in the — Circuit Court, and in the county of this state where the said maker then resided, and on the — day of —, 18—, recovered judgment thereon against him for — dollars and costs.

That plaintiff caused an execution to issue immediately, and placed the same in the hands of the sheriff of said county.

That on the — day of —, 18—, said sheriff returned said execution, with his return indorsed thereon, "No property of the defendant found on which to levy this execution," and said judgment remains wholly unpaid.

That said note is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy note and indorsement.*]

1. Indorsement must be set out. *Williams v. Osborn*, 75 Ind. 280; ante, vol. 1 § 418.

2. Facts showing diligence to collect from maker must be alleged. In an action upon a promissory note negotiable by statute the indorser is only liable upon a failure, due diligence being used, to collect from the maker. The allegation of diligence in this class of cases takes the place of presentment and notice in actions on notes payable in a bank in this state. *R. S.* 1881, § 5504; ante, vol. 1, §§ 129, 612; *Huston v. The First National Bank of Centerville*, 85 Ind. 21.

It is not sufficient to allege, in general terms, that due diligence has been used. The *facts* showing diligence, or a proper excuse for a failure to prosecute the maker, must be alleged. Ante, vol. 1, § 612.

This rule applies to claims against estates. *Huston v. The First National Bank of Centerville*, 85 Ind. 21.

3. Return of "no property found" sufficient. The return of "no

property found," by the proper officer, is equivalent to an allegation of insolvency. *Hanna v. Pegg*, 1 Blkf. 179; *Bullitt v. Scribner*, 1 Blkf. 14; *Williams v. Nesbit*, 65 Ind. 171.

4. What amounts to due diligence. Maker must be sued at first term of court after maturity of note, or show excuse for failure to do so. *Herald v. Scott*, 2 Ind. 55; *Merriman v. Maple*, 2 Blkf. 350; *Kelsey v. Ross*, 6 Blkf. 536; *Nance v. Dunlavy*, 7 Blkf. 172; *Spears v. Clark*, 7 Blkf. 283; *Litterer v. Page*, 22 Ind. 337; *Miller v. Deaver*, 30 Ind. 371; *Roberts v. Masters*, 40 Ind. 461; *Markel v. Evans*, 47 Ind. 326; *Pennington v. Hamilton*, 50 Ind. 397; *Binford v. Wilson*, 65 Ind. 70; *Williams v. Nesbit*, 65 Ind. 171; *Grim v. Moore*, 79 Ind. 103.

5. Doctrine as to diligence does not apply to notes payable in bank. *Sohn v. Morton*, 92 Ind. 170

6. Measure of damages. The indorsee can only recover the amount paid by him for the note, with interest. *Schmied v. Frank*, 86 Ind. 250.

And in the absence of any evidence as to the amount, it will be presumed that he paid the face of the note. *Felton v. Smith*, 88 Ind. 149.

105.—Indorsee against indorser—Excuse for failure to use diligence against maker.

[*Caption and commencement.*]

[*Follow Form 104 to *, and continue.*] That when said note became due the said maker was, and still is, notoriously insolvent, so that an execution against him would have been unavailing [*or*, the said maker was at the time said note was assigned by defendant to plaintiff [*or*, at the maturity of said note], and still is, a non-resident of this state].

That said note is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy note and indorsement.*]

1. Excuse for failure to use diligence against maker. (a.) A showing that maker has been insolvent from the time judgment could have been obtained is sufficient. *Black v. Wilson*, 7 Blkf. 532; *Herald v. Scott*, 2 Ind. 55; *Reynolds v. Jones*, 19 Ind. 123; *Roberts v. Masters*, 40 Ind. 461; *Markel v. Evans*, 47 Ind. 326; *Pennington v. Hamilton*, 50 Ind. 306; *Campbell v. Gould*, 11 Ind. 133; *Couch v. The First National Bank of Thorntown*, 64 Ind. 92; *Groin v. Moore*, 79 Ind. 103; *Schmied v. Frank*, 86 Ind. 250.

So insolvency after judgment excuses the issuing of execution. *Miller v. Deaver*, 30 Ind. 371.

It is also held to be sufficient to show the insolvency from the time of the indorsement, if after maturity. *Kistner v. Spath*, 53 Ind. 288.

If the maker has not more than the six hundred dollars worth of property allowed as exempt, he is insolvent. R. S. 1881, § 703; *Williams v. Osborn*, 75 Ind. 280; *Dick v. Hitt*, 82 Ind. 92.

(b.) *Non-residence of maker.* That the maker was, at the time of the assignment, and has ever since been, a non-resident of the state is a sufficient excuse

for not proceeding against him. *Bernitz v. Stratford*, 22 Ind. 320; *Holton v. McCormick*, 45 Ind. 411; *Patterson v. Carrell*, 60 Ind. 128; *Stevens v. Alexander*, 82 Ind. 407.

(c.) *Agreement or request that payment shall not be demanded at maturity.*

If the indorser agrees that payment shall not be demanded of the maker until a certain time after maturity, this is a sufficient excuse for not acting until then. *Nance v. Dunlavy*, 7 Blkf. 172; *Brown v. Robbins*, 1 Ind. 82; *Davis v. Leitzman*, 70 Ind. 275; *Lowther v. Share*, 44 Ind. 390; *Schmied v. Frank*, 86 Ind. 250.

It has been held that where the indorsement contains an agreement to "stand good six months," it is in effect a waiver of diligence to collect from the maker during that time. *Lomax v. White*, 83 Ind. 439.

(d.) *Bankruptcy of maker.* It is not sufficient to allege that the maker has been adjudged a bankrupt. It must appear that there are no assets. *Somerby v. Brown*, 73 Ind. 353.

(e.) *Coverture of maker.* *Huston v. First Nat. Bk. of Centerville*, 85 Ind. 21.

(f.) *Other excuses.* *Marshall v. Pyeatt*, 18 Ind. 255.

2. Assignment and indorsement—Difference. It is not sufficient to allege the *assignment* of the note, or that it was *assigned in writing*. An indorsement is necessary, as an assignment does not warrant the solvency of the maker. *Williams v. Osborn*, 75 Ind. 280.

3. Indorsement without delivery passes no title. The indorsement without delivery passes no title, but the possession of the note is sufficient evidence of its delivery, and a direct allegation thereof is not necessary to the sufficiency of the complaint. *Wulschner v. Sells*, 87 Ind. 71.

So, where the note sued upon is indorsed by the plaintiff, it will be presumed that, although indorsed, it was never delivered. *McCormick v. Eckland*, 11 Ind. 293; *Wulschner v. Sells*, 87 Ind. 71.

4. Title, how alleged. That the payee "assigned the note to the plaintiff by indorsement" is sufficient. *Simpkins v. Smith*, 94 Ind. 470.

5. Diligence necessary to hold remote indorser. In order to hold a remote indorser liable, it is necessary to show diligence to collect from the maker, but not from an immediate indorser. *Pennington v. Hamilton*, 50 Ind. 397.

6. Measure of damages. In an action by an indorsee against an indorser of a note not payable in bank he can only recover the amount paid by him for the note and interest, and not the amount of the note. *Foust v. Gregg*, 68 Ind. 399; *Schmied v. Frank*, 86 Ind. 250.

7. Interest after maturity. Where the note does not specify the rate of interest after maturity, the rate contracted for before maturity will be allowed. *Kimmell v. Burns*, 84 Ind. 370; *Shaw v. Rigby*, 84 Ind. 375; *Kerr v. Haverstick*, 54 Ind. 178.

106.—Indorsee against indorser—Payable in another state— Negotiable by foreign statute.

[*Caption and commencement.*]

That on the — day of —, 18—, at San Diego, California, A.

B., by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay C. D., or order, — dollars, — months after date, at the Consolidated National Bank of San Diego, California.

That the defendant, C. D., indorsed said note to the plaintiff before maturity.

That on the — day of —, 18— [or, at the maturity thereof], said note was duly presented at said bank, and payment demanded, which was refused, of which the defendant, on said day, had notice.

That, by an act of the legislature of the said State of California, a copy of which is filed herewith, and made a part of this complaint, and which was at the time said note was executed and ever since has been in force, said note was and is negotiable as an inland bill of exchange.

That said note is now due and unpaid.

Wherefore, etc. .

[Signature.]

[Copy of note, indorsement, and statute.]

1. Statute of another state must be set out. If a statute of another state is the foundation of the action, it must be set out by filing a copy thereof with the complaint. Ante, vol. 1, 396; *Tyler v. Kent*, 52 Ind. 583.

But it is believed to be unnecessary in this kind of action, as the note and not the statute is the foundation of the action. It is set out above, however, as being the safer course.

2. Measure of damages. As to the measure of damages, see R. S. 1881, §§ 5507–5513.

107.—Indorsee against indorser—Payable in another state— Indorsed in this state—Due diligence.

[Caption and commencement.]

That on the — day of —, 18—, at —, Indiana, A. B., by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay defendant, or order, — dollars, at the First National Bank of San Diego, California, — months after date.

That defendant, by his indorsement thereon, a copy of which is filed herewith, and made a part of this complaint, assigned said note to the plaintiff.

That at the maturity of said note the same was not paid.

That on the — day of —, 18— [or, the day after its maturity], the plaintiff brought suit thereon against the maker before —, a justice of the peace in and for — township, — county, State of

Indiana, and on the — day of —, 18—, recovered judgment against him thereon before said justice.

That on the — day of —, 18—, plaintiff caused execution to be duly issued on said judgment, and placed in the hands of the constable of said township.

That on the — day of —, 18—, said constable returned said execution—"The defendant has no property out of which any part of this execution can be made."

That said maker has owned no real estate since said note was executed.

That no part of said judgment has been paid.

That said note is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of note.]

1. Due diligence. See ante, p. 60, Form 104, and notes.

108.—Heirs of payee against maker.

[Caption and commencement.]

That on the — day of —, 18—, defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay A. B. — dollars, — months after date.

That on the — day of —, 18—, the said A. B. departed this life, at —, in the State of Indiana, leaving the plaintiffs his only heirs at law.

That there are no debts outstanding against the estate of the said A. B., and his estate has been fully settled without administration.

[Or, that one — was, on the — day of —, 18—, duly appointed as the administrator of the estate of said A. B., and said estate has been fully settled, and all debts or claims of any and all kinds against the same fully paid and satisfied, and said administrator was, on the — day of —, 18—, discharged from his said trust by order of the — Circuit Court]; [or if administrator has not been discharged, say, there are no debts or claims outstanding against said estate, and said administrator is made a party defendant to answer as to his interest in said note].

That said note is now due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of note.]

1. Heir or devisee, when may sue on note payable to deceased.

The heir or devisee is the owner of a note given to the deceased *subject to the payment of the debts of the estate*, and if there are no debts, or the debts have been paid in full, such heir or devisee may sue thereon. *Martin v. Reed*, 30 Ind. 218; *Bearss v. Montgomery*, 46 Ind. 544; *Mitchell v. Dickson*, 53 Ind. 110; *Garner v. Graves*, 54 Ind. 188.

And in the settlement of the estate without administration one heir may indorse the note to another of the heirs, vesting the title to the entire note in him, and entitling him to sue thereon. *Martin v. Reed*, 30 Ind. 218; *Mitchell v. Dickson*, 53 Ind. 110.

2. Representatives necessary parties. If there are representatives of the estate, they are necessary parties to the action. If there are none, this must be alleged in the complaint. *St. John v. Hardwick*, 11 Ind. 251; *Bray v. Black*, 57 Ind. 417.

As to the proper manner of raising the question when these allegations are lacking, see *Bray v. Black*, 57 Ind. 417.

SECTION V.

DUE BILLS.

109.—Payee against maker.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, by his due bill, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars.

That said due bill is now due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of due bill.*]

1. Sued on as a note. An instrument sued on should be called by its right name in the complaint, but it has been held that where a due bill made part of the complaint was sued on as a note, the complaint would be deemed amended in the Supreme Court. *McDonald v. Yeager*, 42 Ind. 388.

2. Are negotiable under the statute. R. S. 1881, § 5501; ante, vol. 1, § 129; *Bowers v. Headen*, 4 Ind. 318.

BONDS AND UNDERTAKINGS.

SECTION XVI.

PENAL BONDS GENERALLY.

110.—General skeleton.

[*Caption and commencement.*]

That on the — day of —, 18—, defendants executed to the plaintiff their bond, a copy of which is filed herewith, and made a part of this complaint, in the sum of —, by which they bound and obligated themselves to [*state the condition which was broken*].

That the defendants have not [*state the omission constituting the breach*], to the plaintiff's damage — dollars.

That said damages are due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

GENERAL PRINCIPLES APPLICABLE TO ACTIONS ON BONDS.

1. Several breaches may be charged in same paragraph. Ante, vol. 1, § 381; *Richardson v. The State*, 55 Ind. 381; *McFall v. Howe, etc., Co.*, 90 Ind. 148.

But the several breaches may be answered or demurred to as separate causes of action. *McFall v. Howe, etc., Co.*, 90 Ind. 148; *The State v. Roche*, 94 Ind. 372.

2. Breaches, how averred. The breaches of the bond must be particularly set out. It is not sufficient to allege the failure to comply with the terms of the bond in general terms. *Evans v. The State*, 2 Blkf. 387; *The State v. Harvey*, 8 Blkf. 527; *The State v. Lane*, 4 Ind. 163; *The State v. Littlefield*, 4 Blkf. 129; *Kintner v. The State*, 3 Ind. 86; *Malone v. McClain*, 3 Ind. 532; *Love v. Kidwell*, 4 Blkf. 553; *Uhrig v. Sniex*, 32 Ind. 493; *State v. Votaw*, 8 Blkf. 2; *Stanton v. The State*, 82 Ind. 463; *Moody v. The State*, 84 Ind. 433; *Colgate v. Roberts*, 85 Ind. 464; *Higgins v. The State*, 87 Ind. 282; *Henry v. The State*, 98 Ind. 381.

3. Non-payment of damages must be alleged. It must be alleged in an action on a private bond that the damages have not been paid. *Michael v. Thomas*, 27 Ind. 501; *Love v. Kidwell*, 4 Blkf. 553.

It is otherwise in actions on official bonds. *The State v. Cross*, 6 Ind. 387; *The State v. McClane*, 2 Blkf. 192.

4. Import a consideration. Bonds for the payment of money import a consideration, and none need be alleged. *Baker v. Board Commrs. Washington Co.*, 53 Ind. 497.

5. What sufficient consideration. *McAlister v. Howell*, 42 Ind. 15; *Butler v. Wadley*, 15 Ind. 502.

6. Official creates continuing liability. A bond given by an officer creates a continuing liability against him and his sureties for a failure to perform any duty imposed upon him by any law in force when the bond is executed, and such as may be imposed by subsequent legislation. *Davis v. The State*, 44 Ind. 38.

7. Joinder of parties and causes of action. An action against an officer and his sureties on the bond can not be joined with one against the officer to recover against him individually. *Carr v. The State*, 81 Ind. 342; *State v. Foulks*, 83 Ind. 374.

8. Sureties are not liable for money paid to officer without authority of law. *Jenkins v. Lemonds*, 29 Ind. 294; *The State v. Fleming*, 46 Ind. 206; *Scott v. The State*, 46 Ind. 208; *The State v. Givan*, 45 Ind. 267; *Carey v. The State*, 34 Ind. 105; *Hunt v. Milligan*, 57 Ind. 141; *Bowers v. Fleming*, 67 Ind. 541; *Jewett v. The State*, 94 Ind. 549; *Board, etc., v. McFadden*, 88 Ind. 333; *Henry v. The State*, 98 Ind. 381.

9. Signed by surety and delivered to principal on Sunday. A bond signed by the surety and delivered to the principal on Sunday, but delivered to obligee on a secular day, is valid. *City of Evansville v. Morris*, 87 Ind. 269.

10. Death of surety before approval. The fact that the bond is not approved until after the death of the surety does not affect his contract. *Mowbray v. The State*, 88 Ind. 324.

11. Approval of bond—Oath of office—Unnecessary allegations. It is not necessary to allege in the complaint that the bond was approved. Nor that the principal took the oath of office. *Mowbray v. The State*, 88 Ind. 324.

12. Surety signing on promise that other names will be procured. That a surety signed the bond on the promise of the principal that other sureties named would be procured, or that others signed later whose names were not in the bond, is no defense where the obligee has no knowledge of such conditional signing. *Deardorff v. Foresman*, 24 Ind. 481; *The State v. Pepper*, 31 Ind. 76; *The State v. Garton*, 32 Ind. 1; *Webb v. Baird*, 27 Ind. 368; *The State v. Blair*, 32 Ind. 313; *Mowbray v. The State*, 88 Ind. 324.

13. Bond taken by officer or court must be authorized by law, or it is void. A bond taken by an officer or court, acting simply under a statutory power, is void, unless authorized by statute. *Caffrey v. Dudgeon*, 38 Ind. 512; *Byers v. The State*, 20 Ind. 47; *Ham v. Greve*, 41 Ind. 531; *The State v. McLaughlin*, 77 Ind. 335; *The State v. Younts*, 89 Ind. 313.

And being void as a statutory bond, and without consideration, it is not binding as a common law bond. *The State v. Younts*, 89 Ind. 313.

14. Defective cured by statute. R. S. 1881, § 1221; ante, vol. 1, § 1043; vol. 2, § 1440; *Cook v. The State*, 13 Ind. 154; *Moore v. Jackson*, 35 Ind. 360; *Gavisk v. McKeever*, 37 Ind. 484; *Railsback v. Greve*, 58 Ind. 72; *Miller v. McAlister*, 59 Ind. 491; *Boden v. Dill*, 58 Ind. 273; *The Vincennes National Bank v. Cockrum*, 64 Ind. 229; *Free v. The State*, 74 Ind. 66.

15. Defect, how suggested in complaint. *Cook v. The State*, 13 Ind.

154; *Moore v. Jackson*, 35 Ind. 360; *Gavisk v. McKeever*, 37 Ind. 484; *Railsback v. Greve*, 58 Ind. 72; *Boden v. Dill*, 58 Ind. 273; *Fee v. The State*, 74 Ind. 66.

16. Undertaking of surety strictly construed. *Mullikin v. The State*, 7 Blkf. 77; *Urmston v. The State*, 73 Ind. 175.

17. Who proper relators in actions on bonds. R. S. 1881, § 253; ante, vol. 1, §§ 49, et seq.

(a.) *On bond of county treasurer.* Ante, vol. 1, § 51; *The State v. Votaw*, 8 Blkf. 2; *Heagy v. The State*, 85 Ind. 260; *Hunt v. The State*, 93 Ind. 311.

(b.) *Commissioner to sell real estate.* Ante, vol. 1, § 52; *Owen v. The State*, 25 Ind. 107.

(c.) *Township trustee.* Ante, vol. 1, § 53; *Davis v. The State*, 44 Ind. 38; *Robinson v. The State*, 60 Ind. 26; *Steinmetz v. The State*, 47 Ind. 465.

(d.) *Where the state is real party in interest, none necessary.* Ante, vol. 1, § 54; *Fry v. The State*, 27 Ind. 348; *Shane v. Francis*, 30 Ind. 92; *The State v. Johnson*, 52 Ind. 197.

(e.) *Money due the state in hands of public officer.* Ante, vol. 1, § 55.

(f.) *Guardians.* Ante, vol. 1, § 58; *Blackwell v. The State*, 26 Ind. 204.

(g.) *Executors and administrators.* Ante, vol. 1, §§ 55, 71, 72, 73.

(h.) *Justice of the peace.* *The State v. Harding*, 5 Blkf. 504.

(i.) *Assignee in trust for creditors.* *Jackson v. Rounds*, 59 Ind. 116.

(j.) *Contractor with board of county commissioners.* *Dewey v. The State*, 91 Ind. 173.

SECTION XVII.

BONDS OF AGENTS.

III.—Subscription agent.

[Caption and commencement.]

That on the — day of —, 18—, it was mutually agreed between plaintiff and defendant, C., that said C. should canvass the cities of — for subscribers to the —, a work published by plaintiff, and should collect and account to plaintiff for all moneys collected or due on such subscriptions, and for all copies of said work intrusted to him by plaintiff, in consideration of the payment of — per cent of the amounts collected by him, a copy of which agreement is filed herewith, marked Exhibit A, and made a part of this complaint.

That in consideration of said contract, and as a part thereof, the defendants executed to plaintiff their bond, a copy of which is filed herewith, marked Exhibit B, and made a part of this complaint, conditioned for the faithful performance of the terms and conditions of said agreement.

That thereupon plaintiff delivered to C. — copies of said book, of the value of — dollars, of which he has left undisposed of to subscribers — copies, of the value of — dollars, for which he has failed to account to plaintiff. And has obtained subscriptions for said book, and has collected from the subscribers therefor so obtained by him, between the — day of —, 18—, and the — day of —, 18—, the sum of — dollars in excess of the commission to which he was entitled under said contract, which sum he has failed to account for or pay over to plaintiff, although requested by plaintiff so to do, to plaintiff's damage — dollars, which is due and unpaid.

Wherefore, plaintiff demands judgment against defendants for — dollars. [Signature.]

[Attach Exhibits A and B.]

1. **Consideration.** *Wilson v. The Town of Monticello*, 85 Ind. 10.
2. **Demand, when necessary.** *Wilson v. The Town of Monticello*, 85 Ind. 10.
3. **Bond in general terms, for performance of duties, what covers.** *Tyler v. The Old Post Building Ass'n.*, 87 Ind. 323.
4. **Bond and agreement form but one contract.** Where a contract of agency is executed, and at the same time a bond given to secure the performance thereof by the agent, the two will be taken as but one contract and construed together. *Burns v. The Singer Mfg. Co.*, 87 Ind. 541.
5. **Copies of bond and contract should be set out.** If the agreement and bond constitute but one contract, they are both the foundation of the action, and should be set out. *Burns v. The Singer Mfg. Co.*, 87 Ind. 541.
6. **Bond broader than contract, effect of.** *Burns v. The Singer Mfg. Co.*, 87 Ind. 541; *Doherty v. Chase*, 64 Ind. 73.
7. **Liability terminated by notice—Notice by one surety.** *McFall v. The Howe Sewing Machine Co.*, 90 Ind. 148.
8. **Necessary allegations of complaint.** *McFall v. The Howe Sewing Machine Co.*, 90 Ind. 148; *Doherty v. Chase*, 64 Ind. 73.
9. **When bond void for illegality of acts to be done by agent.** *Daniels v. Barney*, 22 Ind. 207; *Barney v. Daniels*, 32 Ind. 19.

112.—Clerk or cashier.

[Caption and commencement.]

That on the — day of —, 18—, in consideration that plaintiff would employ the defendant, A. B., as their clerk [cashier], the defendants executed to plaintiff their bond, a copy of which is filed herewith, and made a part of this complaint, in the sum of — dollars, conditioned that the said A. B. would faithfully perform his duties as such clerk [cashier], and faithfully account for and pay over to plaintiff all moneys, evidences of debt, or other property received by

him for plaintiff's use [*or, state the condition broken in the language of the bond*].

That plaintiff thereupon employed said A. B. as such clerk [cashier], [*if for a term, say, for the term of — years from said date*], and said A. B. entered upon his duties as such.

That between the — day of —, 18—, and the — day of —, 18—, said defendant, A. B., as such clerk [cashier], received money and other property, to wit [*describe it*], to the value of — dollars, to the use of the plaintiff, for which he has failed and refused to account to plaintiff, and has converted the same to his own use, to plaintiff's damage — dollars, which is due and unpaid.

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

1. Necessary allegations. *McFall v. The Howe Sewing Machine Co.*, 90 Ind. 148.

SECTION XVIII.

OF CONTRACTORS.

113.—Failure to comply with building contract.

[*Venue and court.*]

A. B., trustee of — School Township, }
 v. } Complaint.
 C. D., E. F., and G. H.

The plaintiff complains of the defendants, and alleges:

That on the — day of —, 18—, the plaintiff and defendant, C. D., entered into a written contract, by which the said defendant agreed to construct a school-house for said school township, at —, and furnish all material therefor at his own expense, for which the plaintiff agreed to pay him the sum of — dollars, one-half to be paid in advance, one-fourth when the frame of said building was up, and the balance when said building was completed, a copy of which contract is filed herewith, and made a part of this complaint. At the same time, and as a part of said contract, said defendant executed to the plaintiff a bond, with the defendants, — and —, as his sureties, binding themselves in the penal sum of — dollars, among other things, that said defendant, —, would in all things comply with said contract, and perform the labor and furnish the material at his own expense, as therein specified, a copy of which bond is filed herewith, and made a part of this complaint.

That the plaintiff paid said — the sum of — dollars at the time

said contract was made, and the further sum of — dollars, on the — day of —, 18—, when the frame of the building was up, and in all other respects performed his part of said contract.

That said — constructed said building in accordance with said contract, and procured the material, but did not pay for the same, and the parties from whom the material was purchased demanded payment from him, but he refused, and they were about to file mechanic's liens therefor against said building, and the plaintiff was compelled to pay the same, amounting to — dollars, whereby the plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

[Copy of contract and bond.]

1. Contract and bond are but one instrument. Mackenzie v. The Board, etc., 72 Ind. 189.

2. Power of board of county commissioners to take and sue on bonds. Baker v. Board of Commrs. of Washington Co., 53 Ind. 497.

3. Consideration need not be alleged. Baker v. Board of Commrs. of Washington Co., 53 Ind. 497.

SECTION XIX.

INDEMNIFYING BONDS.

114.—On indemnifying bond against loss as surety.

[Caption and commencement.]

That on the — day of —, 18—, defendant, —, became indebted to one — in the sum of — dollars, and plaintiff became surety on a note given by said defendant to — therefor, payable — days after said date, with — per cent interest from date.

That to induce plaintiff to become such surety, said defendant, with the defendants, — and —, as his sureties, executed a bond to plaintiff, in the sum of — dollars, conditioned that said defendant would pay said note at maturity, and save the plaintiff harmless as such surety, a copy of which bond is filed herewith, and made a part of this complaint.

That said defendant did not pay said note at maturity, but the plaintiff was compelled to, and did pay the same, to avoid suit thereon [or, that said note was not paid at maturity, but said — brought suit thereon, and recovered judgment against said defendant and plaintiff for the sum of — dollars and — dollars costs, which sums plaintiff

iff has been compelled to pay], and said sum, with interest, amounting to — dollars, is now due to plaintiff, and wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

115.—On bond to save grantee harmless from judgments against lands purchased.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff purchased from the defendant, —, certain real estate, described in the bond hereinafter set out, and paid him therefor the sum of — dollars, receiving from said defendant a deed therefor.

That at the time one — held a judgment against said defendant, rendered by the — Circuit Court, for — dollars, which was a lien upon said real estate.

That in consideration of the full payment of the purchase money for said real estate, said defendant, with the defendants, — and —, as his sureties, executed to plaintiff a bond, in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint, conditioned that he would pay and satisfy said judgment, and save plaintiff harmless from any loss by reason of the lien thereof upon said real estate.

That said judgment was not paid by said defendant, or by any one for him, but on the — day of —, 18—, said — caused execution to issue thereon, and the same was levied on said land, which was sold thereunder to satisfy said judgment, for the sum of — dollars, being the amount of the judgment, interest, and costs.

That plaintiff was unable to redeem said real estate, and lost the whole thereof.

[*Or, That said — caused execution to issue on said judgment, which was levied on said land, and plaintiff was compelled to pay said judgment, interest, and costs, amounting to the sum of — dollars, to prevent the sale of the real estate under said execution, no part of which has been repaid to him.*]

Whereby plaintiff was damaged in the sum of — dollars, which is due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Necessary allegations. *Loyd v. Marvin*, 7 Blkf. 464.

2. What will amount to a breach. *Loyd v. Marvin*, 7 Blkf. 464; *Schooley v. Stoops*, 4 Ind. 130; *Tate v. Booe*, 9 Ind. 18; *Johnson v. Britton*, 23 Ind. 105.

3. When amounts to a security as well as an indemnity. *Kirk v.*

The Fort Wayne Gas Light Co., 13 Ind. 56; Merritt v. Wells, 18 Ind. 171; Johnson v. Britton, 23 Ind. 105; The South Side Planing Mill Ass'n. v. The Cutler & Savidge Lumber Co., 64 Ind. 560; Bodkin v. Merit, 86 Ind. 560.

4. Measure of damages. Schooley v. Stoops, 4 Ind. 130; Tate v. Booe, 9 Ind. 13; Weddle v. Stone, 12 Ind. 625; Johnson v. Britton, 23 Ind. 105; Devol v. McIntosh, 23 Ind. 529; The South Side Planing Mill Ass'n. v. The Cutler, etc., Co., 64 Ind. 560.

5. When cause of action arises. On this point the authorities in this state are conflicting, some holding that no action can be maintained by the obligee until he is *actually damaged*, or, at most, only nominal damages can be recovered. Schooley v. Stoops, 4 Ind. 130; Tate v. Booe, 23 Ind. 13.

This is no doubt true where the bond is purely an indemnity. But where the bond is in the nature of a security for the payment of a debt, as well as an indemnity against loss, *the failure to pay the debt* constitutes a cause of action, upon which suit may be maintained, and the amount of the debt recovered for the benefit of the party to whom it is due, although the obligee in the bond has paid nothing. Ante, vol. 2, § 1471; Johnson v. Britton, 23 Ind. 105; The South Side, etc., Ass'n. v. The Cutler, etc., Co., 64 Ind. 560; Devol v. McIntosh, 23 Ind. 529; Gunel v. Cue, 72 Ind. 34; Bodkin v. Merit, 86 Ind. 560; Reynolds v. Shirk, 98 Ind. 480.

6. Parties. Where the bond is for the payment of the debt of the obligor to some third person, such person should be made a party to the action. Devol v. McIntosh, 23 Ind. 529; The Southside, etc., Ass'n. v. The Cutler, etc., Co., 64 Ind. 560.

And the creditor may sue upon the bond, making all persons interested parties to the action. Ante, vol. 1, § 36; Devol v. McIntosh, 23 Ind. 529; The South Side, etc., Ass'n. v. The Cutler, etc., Co., 64 Ind. 560, and cases cited.

7. When officer may demand and enforce bond of indemnity for official acts. Bosley v. Farquar, 2 Blkf. 61; State v. Sandlin, 44 Ind. 504; Anderson v. Farns, 7 Blkf. 343; Allwein v. Sprinkle, 87 Ind. 240.

See INDEMNITY, p. 164; INDEMNIFYING MORTGAGES, p. 233.

SECTION XX.

TITLE BONDS.

116.—On bond for conveyance of real estate.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff purchased from the defendant, —, certain real estate, described in the bond herein-after set out, and agreed to pay him therefor the sum of — dollars, one year thereafter, for which he gave his promissory note.

That in consideration thereof, said defendant, with the defendant, —, as his surety, executed to plaintiff his bond, in the sum of —

dollars, a copy of which is filed herewith, and made a part of this complaint, conditioned that he would, on the payment of said purchase money at maturity, convey said real estate to plaintiff, free from incumbrance, by a good and sufficient warranty deed.

That on the — day of —, 18— [or, at the maturity of said note], plaintiff tendered to said defendant said purchase money, and demanded a deed for said real estate, but he failed, and refused, and still refuses to make said deed, whereby plaintiff is damaged in the sum of — dollars, which is due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Necessary allegations. *Newman v. Perrill*, 73 Ind. 153; *Carpenter v. Lockhart*, 1 Ind. 434; *Adamson v. Rose*, 30 Ind. 380; *Reed v. Hodges*, 80 Ind. 304; *Axtel v. Chase*, 77 Ind. 74.

2. Measure of damages. *Carpenter v. Lockhart*, 1 Ind. 434; *Adamson v. Rose*, 30 Ind. 380; *Junk v. Barnard*, 99 Ind. 137.

3. What will amount to a breach. *Junk v. Barnard*, 99 Ind. 137.

SECTION XXI.

OFFICIAL BONDS.

EXECUTORS AND ADMINISTRATORS.

117.—By a creditor.

The State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

The State, on relation of A. B.,
 ^{v.}
 C. D., E. F., and G. H. } Complaint.

The plaintiff complains of the defendants, and alleges:

That on the — day of —, 18—, I. J. departed this life, in the county of —, State of Indiana, testate.

That by his last will he appointed the defendant, C. D., the executor thereof.

That on the — day of —, 18—, said will was duly admitted to probate in said county, the defendant, C. D., duly qualified as such executor, and executed his bond to the State of Indiana, in the penal sum of — dollars, with the defendants, E. F. and G. H., as his sureties, conditioned that he would faithfully discharge the duties of

his trust, a copy of which is filed herewith, and made a part of this complaint, letters testamentary were duly issued to him as such executor, and he entered upon his duties.

That the relator is a creditor of the estate of said I. J., in the sum of — dollars, upon a claim filed in the office of the clerk of the — Circuit Court, which was duly reported to said court by said executor for allowance, and by the court allowed on the — day of —, 18—, in full, and six per cent interest from that date.

That said executor has assets of said estate in his hands, applicable to plaintiff's claim, amounting to — dollars, and said estate is clearly solvent.

That said executor has neglected and refuses to pay plaintiff's claim, or any part of it, although payment has been demanded.

Wherefore, plaintiff demands judgment for the amount of his said claim, and ten per cent damages thereon.

F. M. GRIFFITH,
Attorney for Plaintiff.

[*Copy of bond.*]

1. Creditor may sue on bond for failure to pay claim. R. S. 1881 § 2385, 2458.

2. Validity of bond not affected by irregularities. R. S. 1881, § 2244.

3. What will amount to a breach of the bond. R. S. 1881, § 2458; *The State v. Johnson*, 7 Blkf. 528; *The State v. Scott*, 12 Ind. 529; *Rubottom v. Morrow*, 24 Ind. 202; *Heady v. The State*, 60 Ind. 316; *Stanton v. The State*, 82 Ind. 463; *Embree v. The State*, 85 Ind. 368; *Hinds v. Hinds*, 85 Ind. 312; *Higgins v. The State*, 87 Ind. 282; *The State v. Cloud*, 94 Ind. 174.

4. Claim need not be reduced to judgment. It was held in some of the earlier cases that the creditor could not maintain an action on the bond until he had established his claim by a legal proceeding. *Hunt v. White*, 1 Ind. 105; *Eaton v. Benefield*, 2 Blkf. 52.

But these cases have been overruled. *Ante*, vol. 1, § 73; *The State v. Railsback*, 7 Ind. 634; *The State v. Hughes*, 15 Ind. 104; *Heady v. The State*, 60 Ind. 316.

5. Who necessary parties. R. S. 1881, § 2458; *Embree v. The State*, 85 Ind. 368; *The State v. Bennett*, 24 Ind. 383.

6. One executor or administrator not surety for the other. It was held in some of the earlier cases that where a joint bond was executed by two executors or administrators, each was the surety for the other on the bond. *Braxton v. The State*, 25 Ind. 82; *Prichard v. The State*, 34 Ind. 187; *Moore v. The State*, 49 Ind. 558.

But these cases are expressly overruled, and a contrary doctrine established by later decisions. *The State v. Wyant*, 67 Ind. 25.

7. Judgment creditor, when may recover. *Pence v. Makepeace*, 75 Ind. 480; *The State v. Brown*, 80 Ind. 425.

8. Demand not necessary. *Pence v. Makepeace*, 75 Ind. 480

118.—By a legatee.

[*Caption and commencement.*]

That on the — day of —, 18—, A. B. departed this life, in the county of —, State of Indiana, testate.

That by his last will and testament he bequeathed to the plaintiff the sum of — dollars, to be paid after payment of debts, and by the terms of said will, the defendant, C. D., was appointed the executor thereof.

That on the — day of —, 18—, said will was duly admitted to probate in said county, the defendant, C. D., duly qualified as such executor, and executed his bond as such to the State of Indiana, in the penal sum of — dollars, with the defendants, E. F. and G. H., as his sureties, conditioned that he would faithfully discharge the duties of his trust, a copy of which bond is filed herewith, and made a part of this complaint, letters testamentary were duly issued to him, and he entered upon his duties as such executor.

That the debts of said estate have been fully paid, and the estate fully and finally settled, and said executor discharged from his trust.

That said defendant, C. D., had in his hands as such executor, after the settlement of said estate and payment of all debts and liabilities thereof, the sum of —, which was applicable to and should have been applied to the payment of the legacy of this relator.

That relator's said legacy is now due, and payment thereof has been demanded of said executor and refused, and the said executor has converted said sum of — dollars to his own use.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Duty of executor to pay legacy. It is the duty of the executor to pay legacies, and for a failure to do so, he is liable on his bond. *Crist v. Crist*, 1 Ind. 570; *Heady v. The State*, 60 Ind. 316; *Gould v. Steyer*, 75 Ind. 50.

2. Order of court to pay, or judgment, not necessary. The legatee need not reduce his claim to judgment, or procure an order of court requiring its payment, before suing on the bond. *Heady v. The State*, 60 Ind. 316; *Gould v. Steyer*, 75 Ind. 50.

3. Complaint must allege final settlement of estate, or discharge of executor, when. *Crist v. Crist*, 1 Ind. 570; *Highnote v. White*, 67 Ind. 596.

See also *Gould v. Steyer*, 75 Ind. 50, which was an action against the residuary legatee.

4. Demand, when necessary. *Voris v. The State*, 47 Ind. 345; *Lane v. The State*, 27 Ind. 108; *Hudson v. The State*, 54 Ind. 378; *Higgins v. The State*, 87 Ind. 282.

5. Widow may sue. The widow has the right to require the executor or administrator to take all necessary steps to save and protect her interests in the estate, and for a failure to do so, which results in actual injury to her, she may recover in an action on his bond. *Sparrow v. Kelso*, 92 Ind. 514.

119.—Heirs on bond of administrator.

[*Caption and commencement.*]

That on the — day of —, 18—, A. B. departed this life, in the county of —, State of Indiana, intestate, leaving the relators his only heirs at law.

That on the — day of —, 18—, the defendant, C. D., was, in said county, duly appointed administrator of the estate of said A. B., executed his bond to the State of Indiana as such administrator, in the penal sum of — dollars, with E. F. and G. H. as his sureties, conditioned for the faithful discharge of his duties, a copy of which is filed herewith and made a part of this complaint, and entered upon his duties.

That there came into the hands of said defendant, A. B., as such administrator, assets of said estate of the value of — dollars, which he converted to his own use, and wholly failed to account for.*

Wherefore, plaintiff demands judgment for — dollars, to be paid into court, to be disposed of according to law.

[*Copy of bond.*]

[*Signature.*]

1. Conversion of money or property breach of the bond. The *State v. Scott*, 12 Ind. 529; *The State v. Bennett*, 24 Ind. 383.

2. What will amount to a conversion. *Embree v. The State*, 85 Ind. 368.

3. Prayer should be that money be paid into court. Where the estate is not fully administered the heir is not entitled to recover the amount due. Therefore the prayer of the complaint should be that it be paid into court. *Moore v. The State*, 49 Ind. 558. See also *Moody v. The State*, 84 Ind. 438.

120. By administrator de bonis non.

[*Venue and court.*]

The State of Indiana, on Relation of O. M., Adminis- trator de bonis non of the Estate of C D., v. E. F., G. H., and I. J.	}	Complaint.
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[*Follow Form 119 to *, omitting allegation that relators are heirs, and continue*]. That the said E. F. was, on the — day of —, 18—, removed from his trust by order of the — Circuit Court [or, was

fully and finally discharged from his trust], without having finally settled said estate.

That on the — day of —, 18—, the relator was, in the county of —, State of Indiana, duly appointed and qualified as administrator de bonis non of said estate.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Administrator de bonis non proper relator. Where the estate remains unadministered it is better to have the administrator or executor removed and an administrator de bonis non appointed, and bring the action on his relation. R. S. 1881, § 2458; *Embree v. The State*, 85 Ind. 368.

2. Measure of damages. R. S. 1881, § 2459.

3. No costs taxed against the estate, when. If the action is brought on the relation of any one interested, other than a succeeding or surviving executor or administrator, or co-executor or co-administrator, no costs can be taxed against the estate. R. S. 1881, § 2459.

GUARDIANS.

121.—On original bond.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, C. D., was duly appointed by the Circuit Court of the county of — guardian of E. F. and G. H., then infant heirs of I. J., and on said day executed his bond to the State of Indiana in the penal sum of — dollars, with the defendants, K. L. and M. N., as his sureties, conditioned that he would faithfully discharge his duties as such guardian, a copy of which bond is filed herewith and made a part of this complaint; which bond was duly approved by said court.

That thereafter there came into the hands of said defendant as such guardian the sum of — dollars, which belonged equally to his said wards [or, — dollars of which belonged to his said ward, E. F., and — dollars to his ward, G. H., the relators herein].

That the relators have arrived at the age of maturity, and have demanded an accounting with said defendant and the payment to them of the amount in his hands as such guardian, but he has failed to pay over to them the said sum of — dollars, or any part thereof, or to account for the same in any way, and has converted the same to his own use.

Wherefore, plaintiff demands judgment for — dollars and ten per cent damages thereon, and for all other proper relief.

[*Copy of bond.*]

[*Signature.*]

1. Who may sue on guardian's bond. R. S. 1881, § 2527; *ante*, vol. 1, § 58; *Potts v. The State*, 65 Ind. 273; *Jackson v. Rounds*, 59 Ind. 116; *Cotton v. The State*, 64 Ind. 573.

2. When action must be brought. The action will lie in some cases before final settlement or discharge of the guardian. *Bescher v. The State*, 63 Ind. 302.

But where there has been a final settlement the action must be brought within three years, when the party suing is not laboring under disability. *The State v. Hughes*, 15 Ind. 104.

3. Demand, when necessary. *Voris v. The State*, 47 Ind. 345; *Shook v. The State*, 53 Ind. 403; *Hudson v. The State*, 54 Ind. 378.

4. What will amount to a conversion. *Richardson v. The State*, 55 Ind. 381; *Kidwell v. The State*, 45 Ind. 27; *The State v. Fleming*, 46 Ind. 206; *Lowry v. The State*, 64 Ind. 421; *The State v. Sanders*, 62 Ind. 562.

5. Measure of Damages. R. S. 1881, § 2521; *Richardson v. The State*, 55 Ind. 381; *Colburn v. The State*, 47 Ind. 310; *English v. The State*, 81 Ind. 455; *Bescher v. The State*, 63 Ind. 302.

6. What will amount to breach of bond. R. S. 1881, § 2521; *Richardson v. The State*, 55 Ind. 381; *Moody v. The State*, 84 Ind. 433.

7. Several breaches may be set out in same paragraph. *Ante*, vol. 1, § 381; *Richardson v. The State*, 55 Ind. 381.

8. Judgment by one ward not a bar to an action by another. Each ward may sue alone as relator, for a breach of the bond and a judgment by one is no bar to a subsequent action of another of the wards injured by the same breach. *Bescher v. The State*, 63 Ind. 302; *Cotton v. The State*, 64 Ind. 573.

But it is held in a later case that the judgment must be for the entire liability on the bond, and the fund brought into court for distribution. *Moody v. The State*, 84 Ind. 433.

9. Default of guardian after death of surety. The estate of a surety whose death occurred prior to the breach of the bond complained of is liable therefor. *Voris v. The State*, 47 Ind. 345; *Toland v. Stevenson*, 59 Ind. 485; *Cotton v. The State*, 64 Ind. 573.

10. Marriage of female ward terminates guardianship. The marriage of a female ward to a person of full age terminates the guardianship and requires the guardian to account. R. S. 1881, § 2526; *Kidwell v. The State*, 45 Ind. 27.

11. Removal of guardian. The statute provides for what causes a guardian may be removed and how. R. S. 1881, § 2524; *Lee v. Ice*, 22 Ind. 384; *Markel v. Phillips*, 5 Ind. 510; *Dibble v. Dibble*, 8 Ind. 307; *Morgan v. Anderson*, 5 Blkf. 503; *Pickens v. Clayton*, 7 Blkf. 321; *Young v. Young*, 5 Ind. 513; *Nettleton v. The State*, 13 Ind. 159.

It has been held that it was not necessary for the husband to file in court his written consent to the wife continuing to act as guardian after the marriage. *Hardin v. Helton*, 50 Ind. 349.

But the present statute expressly provides that "whenever an unmarried woman, who is a guardian, marries, she shall be removed, unless her husband shall signify to the court his assent in writing, filed in open court, to her continuance in said trust." R. S. 1881, § 2524.

12. Payment by guardian to clerk. The payment of money by the guardian to the clerk of the court wherein the guardianship is pending, without an order of court, although done in good faith, does not relieve him or his sureties from liability. *The State v. Fleming*, 46 Ind. 206; *Scott v. The State*, 46 Ind. 203.

13. New bond, liability of surety thereon. The surety upon a new bond is only liable for the default of the guardian occurring subsequent to its execution. *Lowry v. The State*, 64 Ind. 421; *The State v. Page*, 63 Ind. 209.

It was held in some of the earlier cases that where, at the time of the execution of the bond of an officer, there were in fact no assets in his hands, but he, in subsequent reports, charged himself with assets on hand, such reports were binding on the surety, and estopped him to deny that such assets were then in the hands of such officer. *The State v. Gramer*, 29 Ind. 530; *Bagot v. The State*, 33 Ind. 262; *The State v. Prather*, 44 Ind. 287; *Wilmer v. The State*, 44 Ind. 223.

But these cases have been expressly overruled, and the right of the surety to show the facts established. *Lowry v. The State*, 64 Ind. 421.

Where there are several bonds, the action must be upon the one in force when the breach occurred. *The State v. Sanders*, 62 Ind. 562; *Lowry v. The State*, 64 Ind. 421; *Parker v. Medsker*, 80 Ind. 155; *Moody v. The State*, 84 Ind. 433; *Williams v. The State*, 89 Ind. 570.

And where the assets converted are realized from a sale of the ward's real estate, the action must be upon the additional bond required in such cases, *as against the sureties*. See Form 122, and notes, p. 82; *Colburn v. The State*, 47 Ind. 310; *Shook v. The State*, 53 Ind. 403; *Hunt v. The State*, 53 Ind. 321.

But the guardian may be sued alone on his original bond therefor. *Bescher v. The State*, 63 Ind. 302; *Yost v. The State*, 80 Ind. 350.

14. Defective bond cured by statute—Suggestion of defect in complaint. The statute provides that a guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial; nor on account of any defect, informality, or illegality in the appointment of such guardian. R. S. 1881, § 2516, 1221; *The State v. Britton*, 102 Ind. 214.

If the defect does not appear upon the face of the bond, it should be suggested in the complaint. If it appears upon the face of the bond, this is sufficient. R. S. 1881, § 1221; *Fee v. The State*, 74 Ind. 66; *Cook v. The State*, 13 Ind. 154; *Gavisk v. McKeever*, 37 Ind. 484.

15. Execution of bond must be alleged. The complaint must allege the execution of the bond. It is not enough that the names of the defendants sued are the same as those appearing in the bond filed with the complaint. *Fee v. The State*, 74 Ind. 66.

16. Action may be brought before settlement or removal of guardian. *Bescher v. The State*, 63 Ind. 302.

17. Approval of bond. It is held that the approval indorsed on the copy of the bond filed with the complaint is sufficient, without an express averment of its approval. *The State v. Roche*, 94 Ind. 372.

And it is held that the complaint is not bad for a failure to allege the approval of the bond. *Shook v. The State*, 53 Ind. 403; *The State v. Britton*, 102 Ind. 214.

18. Parties. An action may be maintained on the bond against the guardian without joining the sureties. *Bescher v. The State*, 63 Ind. 302.

It is held in this case that where a question arises as to the credits allowed to

the guardian in his report, as between the wards, it is proper that all of the wards should be joined. But this seems to be unnecessary, under a later decision holding that the judgment must be for the whole sum due, and the amount recovered paid into court for distribution. *Moody v. The State*, 84 Ind. 433. When the money is paid in, the fund can be adjusted, as between the wards, in making the distribution.

122.—On additional bond of guardian for sale of real estate.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, C. D., was duly appointed by the Circuit Court of the county of —, guardian of E. F. and G. H., the relators herein, then infant heirs of I. J., and qualified as such.

That on the — day of —, 18—, said defendant, as such guardian, petitioned said court in due form for an order to sell certain real estate, described in the bond hereinafter set out, belonging to said wards, and such proceedings were had under such petition that an order was duly made and given that said defendant, as such guardian, proceed to sell said real estate at public auction, at not less than its appraised value, for cash, upon his giving an additional bond as required by law.

That said defendant executed his additional bond for the sale of said real estate, to the State of Indiana, in the penal sum of — dollars, with the defendants, K. L. and M. N., as his sureties, a copy of which is filed herewith, and made a part of this complaint, which bond was approved by said court.

That on the — day of —, 18—, after giving notice as required by law, said guardian sold said real estate to —, for the sum of — dollars in cash, which sum he then and there received.

That the relators herein have since arrived at the age of maturity, and have demanded an accounting from said guardian, and that he pay to them or account for said sum of money, but he has failed to, pay the same to said relators, or account for the same in any way, but has converted the same to his own use.

[*Or, if the action is by a subsequent guardian, say:* That on the — day of —, 18—, said guardian was by said court removed from his trust as such guardian, without having accounted for said sum of money, and the relator was by said court duly appointed the guardian of said infants in his stead, and qualified as such.

That after his appointment, the relator herein demanded an accounting from said defendant, and the payment of said sum so collected by

him, but he has failed to pay the same, or account for it in any way, but has converted the same to his own use.]

Wherefore, the plaintiff demands judgment for ——— dollars, and ten per cent damages thereon. [Signature.]

[Copy of bond.]

1. Additional bond must be given. The statute requires that an additional bond shall be given. R. S. 1881, § 2532.

And if such bond is not given, and the proceeds of the sale are not accounted for, the ward's title does not pass by the sale. *McKeever v. Ball*, 71 Ind. 398.

But it is otherwise where the money is properly accounted for by the guardian. *Foster v. Birch*, 14 Ind. 445; *Dequindre v. Williams*, 31 Ind. 444; *McKeever v. Ball*, 71 Ind. 398.

The sale may be made by a commissioner, but it is none the less a guardian's sale, and the additional bond must be given by the guardian. R. S. 1881, § 2534; *McKeever v. Ball*, 71 Ind. 398.

2. Complaint need not allege that original bond has been exhausted. The original and additional bonds are separate and distinct securities, given for the protection of different funds, and for the recovery of money received from the sale of real estate the action must be upon the additional bond, and no allegation that the original bond has been exhausted is necessary or proper. *The State v. Steele*, 21 Ind. 207; *Shook v. The State*, 53 Ind. 403; *Colburn v. The State*, 47 Ind. 310; *Lowry v. The State*, 64 Ind. 421.

It was held in some of the earlier cases that the additional bond was subsidiary to the original, and not an independent security, and that the original bond must first be exhausted. *Salyer v. The State*, 5 Ind. 202; *Salyer v. Ross*, 15 Ind. 130. But they were decided under a statute which it was held left it discretionary with the court to require an additional bond or not. *The State v. Steele*, 21 Ind. 207.

This rule applies to the sureties only. The guardian may be sued alone on his original bond for money realized from the sale of real estate. *Bescher v. The State*, 63 Ind. 302.

3. Need not show appraisement of real estate or approval of bond. In the above form the approval of the bond is alleged; but it is held that a failure to allege either that the property was appraised or the bond approved will not vitiate the complaint. *Shook v. The State*, 53 Ind. 403; *Corbaley v. The State*, 81 Ind. 62.

4. Guardian can only sell for money. The guardian can only receive money for the lands of his ward. If he accepts something else in payment the ward may collect the money from the purchaser or set aside the sale, unless the property has passed into the hands of an innocent purchaser. *Bevis v. Heflin*, 63 Ind. 129, and cases cited. *Bescher v. The State*, 63 Ind. 302.

5. Measure of damages. *Colburn v. The State*, 47 Ind. 310. See Form 121, note 5, p. 79.

COUNTY TREASURER.

123.—By county auditor—Failure to pay over or account for taxes.

[*Caption and commencement.*]

That at the general election, held on the — day of —, 18—, the defendant, —, was duly elected treasurer of the county of —, State of Indiana.

That on the — day of —, 18—, said defendant executed his bond as such treasurer, to the State of Indiana, in the penal sum of — dollars, with the defendants, —, —, —, and — as his sureties, a copy of which is filed herewith, and made a part of this complaint, which bond was duly approved and filed.

That on the — day of —, 18—, said defendant entered upon his duties as such treasurer, and thereafter during the term of office for which he was so elected he collected and received as such treasurer taxes due the said county of —, in the sum of — dollars, for the following funds, to wit: [*here set out the particular funds for which taxes were collected and the amounts collected for each.*]

That the term of office of said defendant expired on the — day of —, 18—, and he has in no way accounted for or paid over said sums of money, or any part thereof, but has converted the same to his own use.

That this action is brought upon the written request of the county auditor of — county [*or, by the board of county commissioners of said county of —*].

Wherefore, the plaintiff demands judgment for — dollars and all other proper relief.

[*Signature.*]

[*Copy of bond.*]

1. Who proper relator. If the action is for state revenue the action should be brought by the attorney-general, in the name of the State of Indiana, on the relation of the auditor of state; if for county revenue, by the prosecuting attorney, in the name of the State of Indiana, on the relation of the county auditor. The action can only be brought by the attorney-general upon the written request of the auditor of state, and by the prosecuting attorney upon the written request of the county auditor or board of county commissioners. R. S. 1881, § 6506.

The provision of the statute of 1876 was different as to the person giving the instruction to sue. *Heagy v. The State*, 85 Ind. 260; 1 R. S. 1876, p. 117.

As to who are proper relators generally, see ante, vol. 1, § 49 et seq.; vol. 3, Notes to Form 110, p. 68.

2. Where is his own successor—Liability of sureties. *Rogers v. The State*, 99 Ind. 218.

3. What constitutes sufficient allegation of breach. *Pickett v. The State*, 24 Ind. 366; *Kindle v. The State*, 7 Blkf. 586.

4. Reports of treasurer as evidence. R. S. 1881, § 6507; *Heagy v. The State*, 85 Ind. 260; *Ohning v. The City of Evansville*, 66 Ind. 59.

5. Officer only liable to person to whom duty is owing. To entitle a private individual to sue on the bond of an officer for a breach of duty he must show that the duty was due to him personally. *The State v. Harris*, 89 Ind. 363, and cases cited.

124.—By holder of warrant for failure to pay.

[*Follow Form 123 to *, and continue*]. That on the — day of —, 18—, W. S., then auditor of said county, issued and delivered to the relator his warrant on said treasurer, for money due him from said county of —, and theretofore allowed by the board of county commissioners of said county, in the words following [*here copy warrant*].

That on the — day of —, 18—, the relator presented said warrant to said defendant, as such treasurer, for payment, but he refused to pay the same, or any part thereof.

That at the time said warrant was presented, said defendant had in his hands, of the fund upon which said warrant was drawn, sufficient to pay the same, and all other warrants drawn upon and payable out of said fund, in full.

Whereby the relator has been damaged in the sum of — dollars.

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

SHERIFF.

125.—Neglect to levy execution.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, C. D., was duly elected sheriff of the county of —, State of Indiana, and on the — day of —, 18—, he, with the defendants, E. F. and G. H., as his sureties, executed his bond, in the penal sum of — dollars, to the State of Indiana, conditioned for the faithful performance of his duties as such sheriff, a copy of which is filed herewith, and made a part of this complaint.

That on the — day of —, 18—, said defendant entered upon his duties as such sheriff.

That on the — day of —, 18—, and during said defendant's term as sheriff, the relator recovered a judgment against one I. J., in

the Circuit Court of — county, in the sum of — dollars and costs, amounting to — dollars.

That afterward, on the — day of —, 18—, an execution on said judgment was duly issued and delivered to said defendant, as such sheriff, commanding him to make of the goods and chattels of said I. J. the said sum of — dollars damages, and — dollars costs, and for want of goods and chattels, that he cause the same to be made of the lands and tenements of said I. J., and that he return said execution within — days thereafter [*or state the exact language of the command of the writ*], and the said sheriff was not otherwise commanded by the relator or his agent or attorney.*

That said defendant neglected and refused to levy or execute said process, although there was then in said county personal property belonging to said I. J., subject to execution, and on which he might have levied, sufficient to make said amount.

That said defendant might, by proper diligence, have made the full amount of said judgment, but, by reason of his neglect, said property was removed, and wholly lost, the said execution defendant became insolvent, and the relator lost his judgment.

Wherefore, plaintiff demands judgment against the defendants for — dollars damages.

[Signature.]

[Copy of bond.]

1. Default must be shown to be during sheriff's term of office. Rany v. The Governor, 4 Blkf. 2.

2. Measure of Damages. Where the action is for failure to levy or return an execution, facts showing special damages must be alleged, or nominal damages only can be recovered. R. S. 1881, §§ 784, 786, 787; The State v. Dixon, 80 Ind. 150; Collier v. The State, 10 Ind. 58; The State v. Blanch, 70 Ind. 204.

If damages are shown, the statute adds thereto interest, and *not exceeding* ten per cent on the principal. R. S. 1881, § 786; The State v. White, 88 Ind. 587.

3. When suit may be brought, and how. The statute provides that the "proceedings may be commenced immediately upon the default of the sheriff, either before or after the return day, and that the recovery may be by motion or action on the bond. R. S. 1881, § 787; ante, vol. 1, § 188.

4. When levy must be made. The sheriff has sixty days after receipt of the execution within which to levy, *and make at least one offer to sell property*. R. S. 1881, § 719; ante, vol. 2, § 1149; The State v. Blanch, 70 Ind. 204.

But a sheriff may be guilty of negligence, and become liable on his bond, by a failure to levy in a much shorter time, if there is a necessity for greater diligence. The State v. Blanch, 70 Ind. 204.

It is the duty of the sheriff, if he can, to make the money on his execution,

and he can not excuse himself by saying that he made a levy within the time fixed by the statute. *Ante*, vol. 2, § 1149.

Where the judgment defendant is the owner of real estate sufficient to satisfy the judgment in the county, the failure to levy will not result in injury, as the levy is not necessary either to fix the lien or make the sale. *Ante*, vol. 2, § 1149.

Upon the question of the levy generally, see *ante*, vol. 2, § 1149, et seq.

5. Must allege that sheriff was not directed not to levy. The statute makes it the duty of the sheriff to levy within a certain time, "unless otherwise directed by the plaintiff or plaintiffs, or his or their agents." It is held, therefore, that the complaint, to be sufficient, must allege that no such direction was given. *Montgomery v. The State*, 53 Ind. 108; *The State v. Emmons*, 88 Ind. 279.

6. To whom sheriff liable for failure to levy. *State v. Blanch*, 70 Ind. 204; *State v. White*, 88 Ind. 587; *State v. Krug*, 82 Ind. 58; *Harmon v. The State*, 82 Ind. 197; *Kackley v. The State*, 91 Ind. 437.

7. Must show that property could have been levied upon. The statute makes a sheriff liable for a failure to levy when it "might have been done," and the complaint, to be good, must show that the levy might have been made. R. S. 1881, § 783; *State v. White*, 88 Ind. 587.

8. Return of sheriff as evidence. The return of the sheriff is conclusive as against him, but only *prima facie* evidence as against his sureties. *Ante*, vol. 1, § 244; vol. 2, § 1186; *Lowry v. The State*, 64 Ind. 421; *Ohning v. The City of Evansville*, 66 Ind. 59.

It was directly held in earlier cases that the sureties were concluded by the return of the sheriff, showing that certain moneys had come into his hands. *State v. Shackelford*, 15 Ind. 376; *Bagot v. The State*, 33 Ind. 262.

The case of *Lowry v. The State* was one against a guardian, in which the question was whether the sureties on his bond were concluded by his reports. It was held that they were not, and the case of *Bagot v. The State* was cited and overruled, as being the same in principle as the one under consideration. But see on this point *State v. Cisney*, 95 Ind. 265.

126.—Failure to return execution.

[Follow Form 125 to *, and continue]. That said defendant, as such sheriff, by virtue of said writ, on the — day of —, 18—, levied on the personal property of said I. J. to the value of — dollars, but although more than one hundred and eighty days have elapsed from the date of said writ he has wholly neglected to make return thereof, and no part of the money directed to be collected thereby has been received by the relator [*state special damages, if any*].

Wherefore, etc.

[Signature.]

[Copy of bond.]

1. Return, when must be made. An execution is made returnable in one hundred and eighty days from its date; but when the writ is satisfied by

the collection of the money it must be returned forthwith. R. S. 1881, §§ 683, 788; ante, vol. 2, § 1184.

Therefore, where the complaint is for a failure to make return, the execution having been satisfied by the collection of the money, it need not be alleged that the one hundred and eighty days from the date of the writ have expired.

2. Measure of damages must be only nominal, unless facts showing special damages are alleged. *State v. Blanch*, 70 Ind. 204; *State v. Dixon*, 80 Ind. 150.

127. For false return.

[*Follow Form 125 to **, and allege breach as follows:.] That on the — day of —, 18—, said defendant, as such sheriff, returned said execution, with the following return indorsed thereon [*copy indorsement*]. But said return is false in this, that [*state in what it is false*].

That [*state facts showing special damages, if any*].

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

1. Measure of damages. See notes to Forms 126 and 125.

128.—Neglect to sell after levy.

[*Follow Form 125 to **, and continue]. That said defendant, as such sheriff, by virtue of said writ, on the — day of —, 18—, levied on personal property of said I. J., subject to execution, of sufficient value to pay plaintiff's claim, but neglected to advertise and sell the same, and no part of the money directed to be made by said execution has been received by the relator; said property has since become wholly worthless, and the said I. J. has become totally insolvent, whereby the relator has lost the whole of his debt.

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

129.—Non-payment of money made on execution.

[*Follow Form 125 to **, and continue]. That on the — day of —, 18—, said defendant, as such sheriff, by virtue of said execution, collected of the said I. J. the full amount due the relator on said execution, and returned the same fully satisfied.

That on the — day of —, 18—, the relator duly demanded of said defendant payment of the amount of his claim so made on said writ, but he did not pay the same or any part thereof, nor has he applied the same to the satisfaction of said execution or accounted for it in any way, but has converted it to his own use.

Wherefore, plaintiff demands judgment for said sum of — dollars and interest, and ten per cent damages thereon.

[*Copy of bond.*]

[*Signature.*]

1. **Necessary allegations.** State v. Cisney, 95 Ind. 265.

2. **Measure of damages.** R. S. 1881, § 785.

CLERK OF CIRCUIT COURT.

130.—Failure to issue summons and attachment.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, was duly elected to the office of clerk of the Switzerland Circuit Court, in and for said county, State of Indiana.

That on the — day of —, 18—, said defendant duly qualified as such clerk, and entered upon his duties.

That on the — day of —, 18—, he, with the defendants, —, —, —, and —, as his sureties, executed to the State of Indiana his bond, in the penal sum of — dollars, to secure the faithful performance of his duties as such clerk, a copy of which is filed herewith, and made a part of this complaint.*

That thereafter, on the — day of —, 18—, during the term of office of said defendant, the relator filed in his office a complaint in said court against one —, for the recovery of the sum of — dollars, which was then due him from said —, and filed his affidavit and undertaking for an attachment against said —, and requested said defendant to issue summons and order of attachment, and tendered him his fees therefor.

That said defendant wholly neglected and refused to issue said summons or order of attachment.

That at the time said complaint, affidavit, and undertaking were so filed, the said — had personal property in said county, subject to attachment and execution, amply sufficient to pay and satisfy the amount due the relator, and which might and could have been seized under an order of attachment, had the same been issued.

That by reason of the failure of said defendant to issue said summons and attachment, said — was given an opportunity to, and did, remove from the state, taking said property with him and disposing of the same, and the said — has since become and is now totally insolvent, whereby the relator has lost his entire debt.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Clerk must issue summons and order of attachment. R. S. 1881, §§ 314, 918.

131.—Failure to issue execution.

[*Follow Form 130 to *, and continue*]. That on the — day of —, 18—, during the term of office of said defendant, the relator recovered a judgment in said court against one M., for the sum of — dollars, which remains in full force, unreplevied, unappealed from, and unsatisfied.

That at the time of the recovery of said judgment, said M. was the owner of personal property, then in said county, subject to execution, sufficient for the satisfaction of said judgment.

That on the — day of —, 18—, during the term of said defendant as such clerk, and while said property of said M. was still in the county and subject to execution, the relator requested said defendant to issue an execution thereon, and filed in his office a written precipe directing him to issue the same, and tendered him his fee therefor, but he wholly failed and refused to issue said writ.

That by reason of his failure to issue execution as directed, the said M. was enabled to, and did, dispose of said property, and he became wholly insolvent [*or, one W. afterward recovered judgment in said court against said M., caused execution to issue thereon, and sold the whole of said property to satisfy his judgment, and M. became and still is insolvent*], [*or state the facts showing special damages*].

Whereby the relator was damaged in the sum of — dollars.

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

1. Liability for failure to issue execution. *State v. Ritter*, 20 Ind. 406.

132.—Failure to pay over money collected.

[*Follow Form 130 to *, and continue*]. That on the — day of —, 18—, the relator recovered a judgment in said court against M. for the sum of — dollars and his costs taxed at — dollars.

That on the — day of —, 18—, said defendant, during his term of office, and as such clerk, collected and received from said M. the amount due on said judgment, including interest, amounting in all to the sum of — dollars.

That on the — day of —, 18—, the relator demanded the

payment of said sum of said defendant, but he has failed and refused to pay the same, or any part thereof, and has converted the same to his own use.

Wherefore, etc.

[Signature.]

[Copy of bond.]

1. What moneys clerk authorized to receive. R. S. 1881, § 5850; Board of Commrs. of Scott Co. v. McFadden, 88 Ind. 333; Jewett v. The State, 94 Ind. 549; Henry v. The State, 98 Ind. 381.

2. Where clerk not authorized to receive, sureties not liable. To authorize an action on the bond of the clerk the money received must be such as he was authorized to receive by virtue of his office. By the terms of the statute he is "authorized to receive money in payment of all judgments, dues, and demands of record in his office, and all such funds as may be ordered to be paid into the court of which he is clerk by the judge thereof." R. S. 1881, § 5850.

If he is not authorized to receive the money, a suit can not be maintained on his bond, but may be against him individually. Jenkins v. Lemonds, 29 Ind. 294; Carey v. The State, 34 Ind. 105; Scott v. The State, 46 Ind. 203; The State v. Fleming, 46 Ind. 206; State v. Givan, 45 Ind. 267; Hunt v. Milligan, 57 Ind. 141.

3. Must pay money in his hands to successor at expiration of term of office. Board of Commrs. of Scott Co. v. McFadden, 88 Ind. 333.

4. Docket and witness fees, fines, and forfeitures. See ante, vol 1, § 55; Carr v. The State, 81 Ind. 342.

COUNTY AUDITOR.

133. Failure to issue order.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, —, was duly elected auditor of — county, State of Indiana, and on the — day of —, 18—, with the defendants, —, —, —, and —, as his sureties, executed his bond as such auditor, in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint.

That he entered upon his duties as such auditor on the — day of —, 18—, and while he was so acting said county was indebted to the relator in the sum of — dollars, which was by the board of commissioners of said county duly allowed, and the order of said board allowing the same was duly entered upon their records.

That the relator requested said defendant, during his term of office, to issue an order upon the treasurer for the amount so allowed, but he has wholly failed and refused to issue the same, whereby the relator

has been prevented from collecting said sum, and has been damaged in the sum of — dollars, for which he demands judgment.

[*Copy of bond.*]

[*Signature.*]

1. Issuing to himself and selling fraudulent order—Sureties not liable. State v. Kent, 53 Ind. 112.

2. Joinder of causes of action. An action on the bond and against the auditor individually can not be joined. State v. Foulks, 83 Ind. 374.

3. What acts covered by bond. State v. Kent, 53 Ind. 112; State v. Levi, 99 Ind. 77; Ware v. The State, 74 Ind. 181.

4. Statute of limitations—When cause of action accrues. Ware v. The State, 74 Ind. 181.

COUNTY RECORDER.

134.—Misrecording deed.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, was duly elected recorder of — county, State of Indiana, and on the — day of —, 18—, with the defendants, —, —, —, and —, as his sureties, executed his official bond as such recorder, in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint.

That he entered upon the duties of his office on the — day of —, 18—, and continued to act as such recorder until the — day of —, 18—.

That on the — day of —, 18—, the relator and his wife, —, executed to one — their warranty deed for certain real estate in said county, then owned by the relator, in which deed the following words were used: "Said grantee agreeing to pay the sum of \$—, as secured by mortgage given by the grantor, —, on said land to one —," which mortgage was given to secure — dollars, owing by the relator to said —, whereby said grantee and said lands became liable for said sum, and said deed, if properly recorded, would have been notice thereof to subsequent purchasers or incumbrancers.

That said deed was, on the — day of —, 18—, duly executed, and on said day was delivered to said defendant, with a request that the same be recorded, and was by him recorded, but by the negligence of said defendant the amount stated therein, as assumed by the grantee and which he agreed to pay, was recorded as \$—, instead of \$—, as it was in said deed.

That afterward said lands were purchased by —, who relied upon the record of said deed as recorded by said defendant, and had no

knowledge that the amount in the deed differed from that shown by the record.

That the relator was, by reason of the negligence of said defendant in recording said deed, compelled to and did pay the sum of money that said — assumed and agreed to pay by the terms of said deed, and could not recover the same, as against said real estate in the hands of said purchaser, and said — had in the meantime become totally insolvent, whereby the relator lost said amount, and has been damaged in the sum of — dollars, for which the plaintiff demands judgment.

[*Copy of bond.*]

[*Signature.*]

1. Action on bond may be maintained for mistake in recording instrument. *State v. Davis*, 96 Ind. 539; *Lowry v. Smith*, 97 Ind. 466.

2. Record only evidence of its own contents, and not of the contents of the instrument recorded. *Gilchrist v. Gough*, 63 Ind. 576; *Lowry v. Smith*, 97 Ind. 466.

3. Other breaches of recorder's bond. *State v. Atkisson*, 17 Ind. 26; *Reeder v. The State*, 98 Ind. 114.

JUSTICE OF THE PEACE.

135.—Failure to issue execution.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, was duly elected justice of the peace for — township, — county, Indiana.

That on the — day of —, 18—, he, with the other defendants herein as his sureties, executed his bond, as such justice, in the penal sum of — dollars, a copy of which is filed herewith and made a part of this complaint, and on said day duly qualified and entered upon the duties of his office.

That during his term of office, to wit, on the — day of —, 18—, the relator recovered a judgment before him as such justice against — for the sum of — dollars and his costs, amounting to — dollars, which remains of record upon the docket of said justice, unappealed from, unplevied, and unsatisfied.*

That on the — day of —, 18—, the relator requested said defendant to issue execution on said judgment, but he has failed and refused to do so.

[*Or, That no direction was given said justice by the relator, his attorney, or agent, to withhold execution thereon, but he has wholly failed and neglected to issue the same.*]

That at the time the relator requested that execution should be is-

sued [*or*, at the time said defendant was required by law to issue execution] on said judgment the said — owned personal property in said county subject to execution sufficient to satisfy the same, and if execution had been issued the same could have been made, but said — has since become totally insolvent and the relator has lost the amount of his judgment.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

136.—Failure to pay over money collected.

[*Follow Form 135 to *, and continue.*] That afterward, to wit, on the — day of —, 18—, said — paid to said defendant, as such justice, the amount of said judgment in full [*or*, the sum of — dollars on said judgment].

That on the — day of —, 18—, the relator demanded of said defendant the payment thereof to him, but he has failed and refused to pay the same, or any part thereof, and has converted the same to his own use.

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

1. For what acts of a justice of the peace an action on the bond may be maintained. (a.) *Judicial acts.* It is held that no action can be maintained on the bond of a justice of the peace for a judicial act or omission,

although caused by neglect, ignorance, mistake, or a willful refusal to act, however erroneous, false, or fraudulent his judgment may be. *Doepfner v. The State*, 36 Ind. 111; *Kress v. The State*, 65 Ind. 106; *State v. Jackson*, 68 Ind. 58.

And the record of a justice is conclusive, although its recitals are not true, either as the result of fraud or mistake. *Larr v. The State*, 45 Ind. 364; *Reed v. Whitton*, 78 Ind. 579.

But see on this point: *State v. Flinn*, 3 Blkf. 72; *State v. Littlefield*, 4 Blkf. 129, and the dissenting opinion in *Doepfner v. The State*, 36 Ind. 111, 113, and cases cited.

(b.) *For money collected.* The sureties on a justice's bond are only liable for moneys collected by him *as justice*. *State v. Woodman*, 36 Ind. 511; *Naugle v. State*, 85 Ind. 469.

But it is not necessary that the money be collected on a judgment. If a note is given him, as justice, to collect, and he collects the money thereon without suit, and fails to pay it over, his sureties are liable in an action on the bond. *Widener v. The State*, 45 Ind. 244.

(c.) *For acts of special constable.* R. S. 1881, §§ 1439, 1440; *Hood v. Sennett*, 70 Ind. 329.

2. Acknowledgment not necessary to validity of bond. *Brown v. The State*, 76 Ind. 214.

3. Acts constituting breach must be specifically stated. *State v. Littlefield*, 4 Blkf. 128.

4. Must show money was collected during term of office. *Naugle v. State*, 85 Ind. 469.

CONSTABLE.

137.—Failure to pay over money—To levy execution and to return the same.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, was duly elected constable of — township, — county, State of Indiana.

That on the — day of —, 18—, he, with the other defendants herein as his sureties, executed his bond as such constable in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint, and on said day entered upon the duties of his office.

The plaintiff alleges the following breaches of said bond :

1. That on the — day of —, 18—, the relator herein recovered a judgment before —, a justice of the peace of said township, against — for — dollars and his costs, taxed at — dollars.

That on the — day of —, 18—, execution was duly issued by said justice on said judgment, and placed in the hands of said defendant, as such constable, to be executed.*

That on the — day of —, 18—, while said defendant was still acting as such constable, he received from said —, on said execution, the sum of — dollars.

That on the — day of —, 18—, the relator demanded of him the payment of the amount so collected by him, but he has wholly failed to pay the same, or to account for it in any way, and has converted the same to his own use.

2. [*Follow allegations of first breach to *, and continue*]. That he failed, as such constable, to indorse on said execution the day and hour when the same came to his hands, or to levy the same upon the property of said —.

That at the time said execution came to the hands of said defendant the said — owned personal property, subject to execution, in said county, upon which the same could have been levied, sufficient to have made the whole of said judgment.

That by reason of the failure of said defendant to indorse said execution and levy the same, as required by law, one — was enabled to and did recover a subsequent judgment against — before said justice, issue execution thereon, and levy upon and sell the whole of said

property owned by said —, whereby said — became and is now totally insolvent, and the relator lost the whole of his judgment.

3. [*Follow allegations of first breach to *, and continue*]. That said defendant has levied said execution upon personal property of said —, perishable in its nature, of the value of — dollars, which was subject to sale under said execution, and free from prior incumbrances and has held said execution more than six months without making return thereof, whereby the relator has been prevented from issuing an alias execution and causing the sale of said property. That since said property was levied upon it has, by reason of the delay of said defendant, become wholly worthless, and said — has become and is now totally insolvent, and the relator has lost his judgment.

That said defendant continued to act as such constable until the — day of —, 18—, and might have returned said execution in time for the relator to have had an alias execution issued, and said property sold, or sufficient thereof, to have paid his judgment in full.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Failure to levy. *State v. Druly*, 3 Ind. 481; *Houglund v. The State*, 43 Ind. 537.

2. Who may approve bond. R. S. 1881, § 5537; *Winningham v. The State*, 56 Ind. 243.

3. Undertaking as against surety strictly construed. If the term for which a constable might have held under the election had expired the complaint must show that his successor had not been elected and qualified, as the undertaking of the sureties will be strictly construed, and the court will presume that his successor had been elected and qualified at the time the act complained of was committed. *Urmston v. The State*, 73 Ind. 175.

4. Failure to sell after levy. *Waymire v. The State*, 80 Ind. 67.

5. Constable's return as evidence. *Waymire v. The State*, 80 Ind. 67.

6. Suffering escape of defendant in bastardy proceeding. *Larkin v. The State*, 89 Ind. 68.

7. When may require execution defendant to give bond of indemnity. A constable must do his duty, without asking the execution plaintiff to indemnify him against loss, and the failure of the plaintiff to give an indemnifying bond is no excuse for a failure to levy. *The State v. Sandlin*, 44 Ind. 504; *Bosley v. Farquar*, 2 Blkf. 61; *Anderson v. Farns*, 7 Blkf. 343.

But if a levy must be defended and the officer is given a bond to indemnify him, in consideration that he will make such defense, the bond may be enforced as a common-law bond. *Allwein v. Sprinkle*, 87 Ind. 240.

TOWNSHIP TRUSTEE.

138.—Failure to pay over or account for moneys collected.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, was duly elected trustee of — township, — county, State of Indiana.

That on the — day of —, 18—, he, with the other defendants herein as his sureties, executed his bond as such trustee in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint.

That he entered upon the duties of his office on the — day of —, 18—, and during his term received of the funds of said township the following amounts belonging to the funds named, to wit: [*here state the several amounts received by him and the fund for which each was received.*]

That the term of office of said defendant expired on the — day of —, 18—, and the relator herein having been duly elected, duly qualified as his successor on said day.

That said defendant had not, during his term of office, paid out or accounted for said money in any way, but still held the same at the end of his term.

That on the — day of —, 18—, the relator demanded an accounting by said defendant, and that he pay over said sum of money then in his hands, but he has wholly failed to pay or in any way account for the same.

Wherefore, the plaintiff demands judgment for — dollars and ten per cent damages thereon.

[*Signature.*]

[*Copy of bond.*]

1. What amounts to a conversion. *State v. Parker*, 33 Ind. 285; *Robinson v. The State*, 60 Ind. 26; *Brocard v. The State*, 79 Ind. 270; *Goodwine v. The State*, 81 Ind. 109.

2. Sureties only liable for acts done during term of office. *Steinback v. The State*, 38 Ind. 483; *Goodwine v. The State*, 81 Ind. 109.

3. Who proper relator. *Hawthorne v. The State*, 48 Ind. 464; *Steinmetz v. The State*, 47 Ind. 465; *Dishon v. The State*, 19 Ind. 255; *Robinson v. The State*, 60 Ind. 26.

4. Necessary allegations of complaint. *Hawthorne v. The State*, 48 Ind. 464; *Inglis v. The State*, 61 Ind. 212; *Morback v. The State*, 34 Ind. 308.

5. Joinder of causes of action. It is held that the civil township and the school township are separate and distinct corporations, and each must sue and be sued by its proper name. *Ante*, vol. 1, § 48.

But it is further held that the successor of a defaulting trustee may, in one action, recover funds belonging to both the civil and school townships, the ac-

tion being brought by him as trustee of both townships. *Steinmetz v. The State*, 47 Ind. 465; *Robinson v. The State*, 60 Ind. 26; *Inglis v. The State*, 61 Ind. 212; *Strong v. The State*, 75 Ind. 440.

6. Order to sue, by county commissioners, not necessary. *Inglis v. The State*, 61 Ind. 212; *Dishon v. The State*, 19 Ind. 255.

7. Measure of damages. *Goldsberry v. The State*, 69 Ind. 430; *Brown v. The State*, 78 Ind. 299; *Watson v. The State*, 80 Ind. 212.

8. Failure to make report. The failure to make an annual report creates no liability, unless some injury resulted to the township or other party interested. *Bocard v. The State*, 79 Ind. 270.

9. Reports of trustee as evidence. *Lowry v. The State*, 64 Ind. 421; *Ohnlg v. The City of Evansville*, 66 Ind. 59; *State v. Haynes*, 79 Ind. 294.

CITY OR TOWN TREASURER.

139.—By successor—Failure to pay over money.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, was duly elected treasurer of the city [*or, town*] of —, in the State of Indiana.

That on the — day of —, 18—, he, with the other defendants herein as his sureties, executed his bond, as such treasurer, in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint.

That he duly qualified and entered upon his duties as such treasurer on the — day of —, 18—, and continued to act as such until the — day of —, 18—, *, when the relator, who had, prior thereto, been duly elected to said office, duly qualified and entered upon the duties thereof as his successor.

That during the term of office of said defendant, as such treasurer, he received of the moneys of said city [*or, town*] the sum of — dollars.

That he did not pay out or account for any part of said sum during his term of office, but still held the same at the expiration of his term [*or, but had during his term of office converted the same to his own use*].

That immediately upon the relator's qualifying as his successor he demanded of said defendant an accounting and the payment to him of said sum of money, but he has wholly failed and refused to pay or account for the same in any way.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

140.—By the city [or, town] for paying illegal orders.

[*Caption and commencement.*]

[*Follow Form 139 to *, and continue.*] That by an ordinance of said city [or, town], in force during his said term of office, it was provided that said treasurer should pay out no money of the city [or, town], except upon an order signed by the mayor and attested by the clerk thereof.

That on the — day of —, 18—, while said ordinance was in force, one — presented to said defendant for payment an order for the sum of — dollars, not signed by the mayor of said city [or, town], [or, not attested by the clerk of said city, or, town], which sum the defendant paid on said order out of the moneys of said city [or, town].

That his term of office expired on the — day of —, 18—, when his successor was elected and duly qualified.

That said city [or, town] was not then indebted to said — in any sum, and said order was fraudulent, whereby the relator lost said sum of — dollars, and said defendant has in no way paid or accounted for the same.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. What will amount to a breach of bond. *Harvey v. The State*, 94 Ind. 159; *State v. Julian*, 93 Ind. 292.

2. Giving of new bond—Liability of sureties. *Harvey v. The State*, 94 Ind. 159.

3. Necessary allegations. The complaint need not allege that the bond was approved, or that a certificate of election was issued, or that the principal took the oath of office. *Mowbray v. The State*, 88 Ind. 324.

4. Approval of bond after death of surety. The fact that the bond was approved after the death of one of the sureties does not relieve his estate from liability thereon. *Mowbray v. The State*, 88 Ind. 324.

RECEIVER.

141. Failure to obey order of court.

[*Caption and commencement.*]

That on the — day of —, 18—, the relator brought his action in the — Circuit Court, against —, to dissolve and close up a partnership then existing between said parties, and such proceedings were had therein; that the defendant, —, was duly appointed receiver in said action, and, by an order of the court, directed to give bond in the sum of — dollars, with sureties to the approval of the court.

That on the — day of —, 18—, he, with the other defendants

herein as his sureties, executed his bond as such receiver, as required by the order of said court, a copy of which is filed herewith and made a part of this complaint, which was approved by the court.

That on the — day of —, 18—, said defendant entered upon his duties as such receiver and took possession of the property of said partnership, consisting of a stock of goods and merchandise, then in a store occupied by them at —.*

That on the — day of —, 18—, final judgment was rendered, in said cause, in favor of the relator, dissolving said partnership and decreeing that the goods and merchandise then in the hands of said receiver belonged to the relator, and that he was entitled to the immediate possession thereof; and said receiver was ordered by the court to immediately deliver the same to the relator.

That the relator demanded said goods from said defendant; but he refused to deliver the same, and still retains them.

That said goods were of the value of — dollars when the same should have been delivered to the relator; but they have since become damaged, and have decreased in value — dollars, and the relator has been otherwise damaged in the sum of — dollars by the refusal of said defendant to comply with said order of the court.

Wherefore, the plaintiff demands judgment for — dollars.

[Copy of bond.]

[Signature.]

142. Failure to pay over money collected.

[Follow Form 141 to *, and continue]. That said receiver was ordered by the court to sell said goods, for cash, at retail and apply the proceeds to the payment of a debt of — dollars then due the relator from said firm for money advanced to the firm and which was admitted by the parties in said action to be due.

That said receiver sold said goods for the sum of — dollars, and received the money therefor, sufficient to pay all expenses of selling the same and to pay relator's debt in full.

That after said money was received, and all expenses paid, and while said defendant was still acting as such receiver, the relator demanded payment of his debt, but he refused to pay the same, and has converted the same to his own use.

That said firm has no other property out of which relator can make his debt and is insolvent.

Wherefore, the plaintiff demands judgment for — dollars.

[Copy of bond.]

[Signature.]

1. Breaches, how assigned. Colgate v. Roberts, 85 Ind. 464.

COMMISSIONER IN PARTITION.

143. For failure to pay money as ordered by the court.

[*Caption and commencement.*]

That on the — day of —, 18—, in an action then pending in the — Circuit Court, wherein the relators herein were the only parties and sole owners of the property sought to be partitioned, it was found by the court that the real estate was owned by the relators in equal parts as tenants in common, and that the same could not be partitioned without injury to the parties, and an interlocutory decree was rendered by said court that said real estate be sold and the proceeds be paid to the relators after paying costs and expenses.

That the defendant, —, was duly appointed by the court a commissioner to sell said real estate, for not less than its appraised value, one-third cash and one-third in one and two years from date of sale, taking the purchaser's notes with security.

That said defendant, on the — day of —, 18—, executed his bond as such commissioner, with the other defendants herein as his sureties, in the penal sum of — dollars, a copy of which is filed herewith, and made a part of this complaint.*

That thereafter, on the — day of —, 18—, in pursuance of the order of said court, he sold said property to one —, for — dollars, which he then and there received.

That he has failed to pay said sum, or any part thereof, to the relators, or to account for the same in any way, but has converted the same to his own use.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

144. For selling notes and converting money to his own use.

[*Follow Form 142 to *, and continue*]. That thereafter, on the — day of —, 18—, in pursuance of the order of said court, he sold said property to one — for — dollars and received one-third thereof in cash and took the purchaser's two promissory notes for the balance, payable in one and two years respectively, with — as surety thereon.

That thereafter he sold and indorsed said notes to — and received therefor the sum of — dollars, which he has failed to pay over and account for and has converted to his own use.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. **Parties.** The action may be brought against any one of the obligors alone. *Williams v. The State*, 87 Ind. 527.
2. **For what acts sureties are liable.** *Williams v. The State*, 87 Ind. 527.
3. **Demand not necessary.** *Ferguson v. The State*, 90 Ind. 38; *Owen v. The State*, 25 Ind. 107.
4. **When cause of action accrues.** *Owen v. The State*, 25 Ind. 107.
5. **Owners of the land proper relators.** *Owen v. The State*, 25 Ind. 107.

SECTION XXII.

STATUTORY UNDERTAKINGS.

145. Appeal bond—Appeal to Supreme Court.

[Caption and commencement.]

That on the — day of —, 18—, in a cause pending in this court, [*or*, in the — Circuit Court], wherein this plaintiff was plaintiff and defendant, —, was defendant, a judgment was rendered in favor of plaintiff against said defendant, for — dollars [*or for whatever equitable relief was decreed*], from which said defendant duly appealed to the Supreme Court of Indiana during the term, at which said judgment was rendered, and prayed for a stay of proceedings.

That the court required a bond to be given in the sum of — dollars, within — days, with surety to the approval of the court.

That the said defendant, within the time fixed by the court, filed his bond in the penalty of — dollars [*or*, from which said defendant appealed to the Supreme Court of Indiana after the term, and, on the — day of —, 18—, applied to said court (*or*, to —, one of the judges of said court) for a *supersedeas*, which was granted upon his giving bond in the sum of — dollars, with sureties to the approval of the clerk of the court below, which bond was, on the — day of —, executed by him], with the defendant, —, as surety thereon, a copy of which bond is filed herewith and made a part of this complaint.

That said bond was duly approved by this court [*or*, the — Circuit Court] [*or, if the bond is filed after the term*, by the clerk of this court or of the — Circuit Court], and proceedings in said action were stayed.

That the conditions of said bond were that the said — would duly prosecute his appeal and abide by and pay the judgment which might be rendered or affirmed against him.

The plaintiff alleges the following breaches of said bond:

1. That said — did not duly prosecute his appeal in this [*state the facts constituting the failure*], and said cause was dismissed and judgment rendered against said — for — dollars costs.

[Or, said judgment was, on the — day of —, 18—, duly affirmed against said —, and judgment rendered against him for costs in said court, amounting to the sum of — dollars.]

That he has not paid said judgments, or either or any part of them.

That plaintiff, on the — day of —, 18—, caused execution to issue on the judgment appealed from, which was returned unsatisfied for want of property whereon to levy, and said judgments of this court, and of the Supreme Court for costs, remain wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Measure of damages. Doe v. Daniels, 6 Blkf. 8; Smock v. Harrison, 74 Ind. 348; Opp v. Ten Eyck, 99 Ind. 345; Hays v. Wilstach, 101 Ind. 100.

2. Necessary allegations. Malone v. McClain, 3 Ind. 532; Gavisk v. McKeever, 37 Ind. 484; Easter v. Acklemire, 81 Ind. 163; Ham v. Greve, 41 Ind. 531; Buchanan v. Milligan, 68 Ind. 118; Hinkle v. Holmes, 85 Ind. 405; Heshion v. Scott, 94 Ind. 570.

3. Judgment need not be made part of complaint. The bond is the foundation of the action, and the judgment need not be set out. Butler v. Wadley, 15 Ind. 502.

4. Bond unauthorized by law. The complaint must show the bond to be one authorized by law, or there can be no recovery. Byers v. The State, 20 Ind. 47.

5. Defect cured by statute. See Form 110, note 14. Gavisk v. McKeever, 37 Ind. 484; ante, vol. 2, § 1092.

6. Failure to prosecute appeal. It is not necessary, in assigning a breach under this condition of the bond, to show a judgment of the Supreme Court. Gavisk v. McKeever, 37 Ind. 484.

7. Approval of the bond. If the appeal is taken and bond given during the term it must be approved by the court, if after the term by the clerk of the court below or of the Supreme Court. R. S. 1881, §§ 638, 642; ante, vol. 2, § 1091; Ham v. Greve, 41 Ind. 531.

But a defective or unauthorized approval or an entire want of approval may be waived. Ante, vol. 2, § 1091; Easter v. Acklemire, 81 Ind. 163.

8. What bond should contain. Ante, vol. 2, § 1092; post, Form 692; Craig v. Encey, 78 Ind. 141.

9. Appeal from decree of foreclosure without personal judgment. As to the right to recover and the necessary allegations of a complaint on the bond in such cases, see Willson v. Glenn, 77 Ind. 585; Scott v. Marchant, 88 Ind. 349.

10. Unlawful detention of lands. As to conditions of bond and measure of damages, see Craig v. Encey, 78 Ind. 141.

11. Appeal bond may be assigned. An appeal bond may be as-

signed and suit maintained in the name of the assignee. *Craig v. Encey*, 78 Ind. 141.

12. Need not be signed by the judgment defendants. *Railsback v. Greve*, 58 Ind. 72; *Thom v. Savage*, 1 Blkf. 51; *Hinkle v. Holmes*, 85 Ind. 405.

13. Court must fix amount of bond, when appeal taken during term. R. S. 1881, § 633; *Ham v. Greve*, 41 Ind. 531; *McClosky v. The Indianapolis Man. & Car. Union*, 87 Ind. 20.

14. Consideration. A bond not sufficient to stay proceedings is without consideration. *Ham v. Greve*, 41 Ind. 531.

But the stay is a sufficient consideration. *Hays v. Wilstach*, 101 Ind. 100.

15. Attempt to collect judgment need not be alleged. The liability of the surety on the bond does not depend upon the failure to make the money on the judgment against the principal or upon his insolvency. But the complaint must show that the judgment is unpaid. *Railsback v. Greve*, 58 Ind. 72.

146.—On appeal bond—From justice of the peace.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff recovered a judgment against the defendant, —, before —, a justice of the peace in and for — township, — county, Indiana, for the sum of — dollars.

That on the — day of —, 18—, said — appealed therefrom to the — Circuit Court, and executed his appeal bond, with the defendant, —, as his surety, a copy of which is filed herewith, and made a part of this complaint.

That said bond was approved by said justice, and his approval indorsed thereon.

That said defendant perfected his appeal, and such proceedings were had in said cause in said — Circuit Court that judgment was, on the — day of —, 18—, rendered in favor of plaintiff against said defendant for — dollars and — dollars costs.

That said defendant has not paid said judgment, or any part thereof, and the same remains unsatisfied.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Approval need not be indorsed on bond. *Miller v. O'Reilly*, 84 Ind. 168.

2. Error in statement of amount of costs. An error in the statement of the amount of costs in the bond does not invalidate it or affect the sureties' liability. The full amount of costs may be recovered, not exceeding the penalty of the bond. *Miller v. O'Reilly*, 84 Ind. 168.

3. Attempt to enforce judgment against principal need not be alleged. *Railsback v. Greve*, 58 Ind. 72.

4. What amounts to a breach of the bond. *Reeves v. Andrews*, 7 Ind. 207.

ARBITRATION.

147.—Statutory bond.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff and defendant, A. B., by a written instrument, a copy of which is filed herewith, and made a part of this complaint, marked Exhibit A, submitted to the arbitration of C. D., E. F., and G. H. certain matters in dispute between them, and agreed therein that said submission should be made a rule of the — Circuit Court of the State of Indiana.

Whereupon, the defendants executed to the plaintiff their bond in the sum of — dollars, conditioned that said A. B. would abide and faithfully perform the award of said arbitrators, a copy of which bond is filed herewith, marked Exhibit B, and made a part of this complaint, and the plaintiff executed a like bond to the defendant, A. B., with sureties, as required by law.

That on the — day of —, 18—, plaintiff appointed the — day of —, 18—, for the meeting of said arbitrators, by notifying the said arbitrators and defendant, A. B. [*or, on the — day of —, 18—, said arbitrators met the plaintiff and defendant, A. B. being present*], and the arbitrators having taken the oath required by law, proceeded to hear and determine the matters submitted to them, and on the — day of —, 18—, awarded in writing that the defendant, A. B., should pay to the plaintiff the sum of — dollars [*or state the award fully, if other than the mere payment of money*].

That on the — day of —, 18— [*or, within fifteen days thereafter*], true copies of said award and costs were served on the plaintiff and defendant, A. B.

That the said defendant failed and refused to comply with said award [*if the award requires the performance of conditions precedent by plaintiff, state them, and allege performance upon his part and a refusal to comply with the award by defendant*].

That thereupon plaintiff, on the — day of —, 18—, filed said award, together with said agreement of submission, in the said — Circuit Court, and caused due proof to be made in said court of said submission and award, and of service of a copy thereof on the defendant, whereupon said submission and award were, by order of said court, duly entered of record, and a rule granted against said defendant to show cause why judgment should not be rendered on said award.

That on the — day of —, 18—, said defendant appeared and answered to said rule by filing objections to said award, and the court proceeded to hear and determine the same [or, that on the — day of —, 18—, said rule to show cause having been duly served on said defendant, more than ten days prior thereto, he failed to appear, and the court proceeded to hear and examine the same in his absence], and having heard the evidence, and being advised in the premises, confirmed said award and rendered judgment thereon [or, modified and corrected the same by (*state how*), and confirmed the same as modified and corrected, and rendered judgment thereon] in favor of plaintiff for said sum of — dollars [or, *if the award requires any act to be done, say*: the court rendered judgment thereon that the defendant (*state the act to be done*)].

That the defendant, A. B., did not abide said award or pay the said sum of — dollars [or, *if some act is required to be done, allege that it has not been done*], although often requested so to do, whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

[*Copy of submission and bond, as Exhibits A and B.*]

1. Arbitration generally. R. S. 1881, §§ 830-855; ante, vol. 1, § 599; vol. 2, §§ 1279-1291.

2. Notice. R. S. 1881, §§ 833, 844; ante, vol. 2, § 1280.

3. Serving copies. R. S. 1881, § 840; ante, vol. 2, § 1283.

4. Filing the award in court. R. S. 1881, § 841; ante, vol. 2, § 1285.

5. Entry and rule to show cause. R. S. 1881, § 842; ante, vol. 2, § 1286.

6. Hearing and judgment. R. S. 1881, §§ 843, 844; ante, vol. 2, § 1286.

7. Party may enforce judgment or sue on bond. Ante, vol. 2, § 1288.

8. No action on the bond until award confirmed. In a statutory arbitration it is the judgment confirming the award that gives it force. Until it is confirmed a failure to comply with it is not a breach of the bond. Therefore the complaint, to be good, must not only show the award, but that upon proper proceedings had it was confirmed by the court designated in the submission. Ante, vol. 1, sec. 599; vol. 2, § 1288.

9. Bias and prejudice of arbitrator, when will render award void. *Bash v. Christian*, 77 Ind. 290.

10. Award can not be impeached in action on bond. The proper time to avoid the award is when the rule to show cause is served and by answer thereto. If the award is confirmed it can not be attacked in defense of an action on the bond. *Shroyer v. Bash*, 57 Ind. 349.

11. Statutory can not be revoked. Ante, vol. 2, § 1290.

12. Measure of damages. Ante, vol. 2, § 1288.

148.—Common law arbitration.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendants executed to the plaintiff an arbitration bond in the sum of — dollars, a copy of which is filed herewith, and made a part of this complaint, conditioned to abide the award of — upon certain matters in dispute between plaintiff and defendant, A. B.*

That on the — day of —, 18—, the said arbitrators having previously undertaken said arbitration, duly made and published their award on the matters submitted, whereby they awarded [*state briefly any conditions precedent to be performed by plaintiff, and also the provision disregarded by said defendant*].

[*Allege performance of the conditions precedent by plaintiff.*]

But defendant, A. B., though demanded, has failed and refused to [*state the breach complained of*].

By reason whereof, plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

[*Copy of bond.*]

1. Difference between statutory and common law arbitration.

Ante, vol. 1, § 599.

2. How may be revoked. Bash v. Christian, 77 Ind. 290.

3. Revocation a breach of the bond. Bash v. Christian, 77 Ind. 290, citing Warburton v. Storr, 4 B. & C. 103; Allen v. Watson, 16 Johns. 205.

149.—For revoking submission.

[*Caption and commencement.*]

[*Follow Form 148 to *, and continue*]. That thereafter and before the matters aforesaid were finally submitted to said arbitrators, the defendant, A. B., by writing delivered to said arbitrators, revoked their powers.

By reason whereof, plaintiff has sustained damage in the sum of — dollars, for which he demands judgment. [Signature.]

[*Copy of bond.*]

ATTACHMENT.

150.—On undertaking for order of attachment.

[*Caption and commencement.*]

That on the — day of —, 18—, in an action for the recovery of money, then commenced [*or, then pending, as the case may be*] by

defendant. — against plaintiff, in the — circuit court, said — applied for an order of attachment against plaintiff's property, and filed an affidavit alleging as a ground therefor that [*state the ground of attachment*], and at the same time said defendant, with the defendant, —, as his surety, duly executed and filed in the office of the clerk of this [*or, the — Circuit Court*], in which said cause was commenced [*or, pending*], an undertaking, a copy of which is filed herewith, and made a part of this complaint, conditioned that said defendant would duly prosecute his proceeding in attachment, and pay all damages which might be sustained by the defendant therein, if his proceedings should be wrongful or oppressive, which bond was approved by said clerk.

And thereupon said order of attachment was issued, and was forthwith executed.

That said proceeding was wrongful and oppressive, in this, to wit: that plaintiff had not [*here negative the ground on which the attachment was issued*], and the claim of said —, on which said action was founded, was fictitious, and such proceedings were had in said cause that said attachment was discharged, and judgment rendered against said —'s claim, and in favor of plaintiff for costs, amounting to — dollars.

That plaintiff has sustained damage by reason of said wrongful order of attachment, in this, that, in the execution of said order, the sheriff seized the goods of plaintiff to the amount of — dollars, and removed them from plaintiff's custody for the space of —, whereby said goods were greatly damaged, and plaintiff was prevented from carrying on his business as a —, and his said business and credit were destroyed.

That plaintiff was compelled to expend the sum of — dollars in procuring the discharge of said attachment and restoration of said property.

That on the — day of —, 18—, plaintiff demanded payment of said amounts, being in all — dollars, from said —, but no part thereof has been paid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of undertaking.*]

[*Signature.*]

1. Non-payment of damages must be alleged. The failure to pay the damages constitutes the breach of the bond. Therefore, such non-payment must be averred. *Love v. Kidwell*, 4 Blkf. 553; *Michael v. Thomas*, 27 Ind. 501; *Uhrig v. Sinex*, 32 Ind. 493.

2. Necessary allegations. *Hoshaw v. Hoshaw*, 8 Blkf. 258; *Trentman v. Wiley*, 85 Ind. 33; *Faulkner v. Brigel*, 101 Ind. 329.

3. Measure of damages. *Trentman v. Wiley*, 85 Ind. 33.

4. By whom bond approved. The bond must be approved by the clerk. R. S. 1881, § 917.

5. Misnomer of obligee, effect of. Hedrick v. Osborne & Co., 99 Ind. 143.

151.—On undertaking for redelivery of property attached.

[*Caption and commencement.*]

That on the — day of —, 18—, in an action then commenced [or, then pending] in the — Circuit Court, by this plaintiff against the defendant, —, for the recovery of money, the plaintiff filed his affidavit and undertaking therefor, and an order of attachment was duly issued against the property of said defendant, and the following property owned by him was levied upon [*state what property*].

And thereupon, on the — day of —, 18—, said defendant applied for a delivery of the property to him, and, together with the defendant, —, as his surety, executed his bond to the plaintiff, in the penal sum of — dollars, conditioned that the property should be kept and taken care of, and delivered to the sheriff on demand, or so much thereof as might be required to be sold on execution to satisfy any judgment which might be recovered against him in the action, or that he would pay the appraised value thereof, not exceeding the amount of the judgment and costs, a copy of which bond is filed herewith, and made a part of this complaint.

That said property was, on the — day of —, 18—, duly appraised at — dollars.

That said bond was delivered to the sheriff, and approved by him, and the property delivered to said defendant.

That such proceedings were had in said cause that the plaintiff recovered a judgment for — dollars and his costs taxed at — dollars, and a judgment in the attachment proceeding for the sale of said property and an order of sale and execution was duly issued thereon.

That the said defendant did not properly keep and take care of said property, but carelessly and negligently kept the same, so that the following part thereof was destroyed or stolen [*describe it*],

That the sheriff, after receiving said execution, demanded the delivery of said property to him [*or enough of said property to satisfy the judgment, if there is more than enough for that purpose*], but the defendant refused to deliver the same, or any part of it.

Whereupon, the sheriff demanded the payment by said defendant of the appraised value thereof [*or, if the appraised value exceeds the*

amount of the judgment and costs, say, the sheriff demanded the payment of the amount of said judgment and costs], which was refused.

That no part of said judgment has been paid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Parties. Where there are several attaching creditors, whether they were parties to the action at the time the undertaking was given or filed under afterward, are interested parties, and must be joined as plaintiffs, or, if they refuse to join, must be made defendants, and the complaint should show the facts. *Moore v. Jackson*, 35 Ind. 360.

2. Defective undertaking cured by statute. The undertaking should be made payable to the plaintiff and delivered to the sheriff. R. S. 1881, § 924.

But a failure to make the bond payable to the plaintiff does not render it invalid. *Moore v. Jackson*, 35 Ind. 360; *Smith v. Scott*, 86 Ind. 346.

3. Must be a judgment for sale of the property. The undertaking is given in the *attachment proceeding*, and in order to recover upon it, it must be shown that there was a *judgment in the attachment proceeding* ordering the sale of the property. It is not enough to show that the plaintiff recovered a personal judgment. Therefore, if the attachment is dissolved, or the proceeding dismissed, or for any other reason the plaintiff fails to recover a judgment for the sale of the attached property, there can be no recovery on the bond. *Gass v. Williams*, 46 Ind. 253; *Smith v. Scott*, 86 Ind. 346.

4. Necessary allegations. *Dunn v. Crocker*, 22 Ind. 324; *Gass v. Williams*, 46 Ind. 253; *Smith v. Scott*, 86 Ind. 364.

5. Approval. The sheriff is authorized to approve the bond. R. S. 1881, § 924.

152.—On bond for restitution of property attached.

[*Caption and commencement.*]

That on the — day of —, 18—, in an action then commenced [*or, then pending*] in the — Circuit Court, by this plaintiff, against the defendant, —, for the recovery of money, the plaintiff filed his affidavit and undertaking therefor, and an order of attachment was duly issued against the property of said defendant, and certain of his property levied upon thereunder.

That thereupon, on the — day of —, 18—, said defendant asked for a restitution of said property, and to procure the same executed his bond, with the defendant, —, as his surety, in the penal sum of — dollars, conditioned that he would appear to the action and perform the judgment of the court, a copy of which bond is filed herewith, and made a part of this complaint.

That said bond was duly approved by the court [*or, sheriff; or, clerk of said court*].

That thereupon said attachment was discharged and the property restored to said defendant.

That thereafter such proceedings were had in said cause that the plaintiff recovered judgment against said defendant for — dollars and his costs, taxed at — dollars.

That said defendant did not perform said judgment or pay the same, or any part of it, but the same is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Restitution bond term...ates attachmen proceedings. The effect of a restitution bond is materially different from one for the delivery of the property. In the latter the *property* may be returned, and the lien of the attachment continues and must be perfected by a judgment. The former has the effect to discharge the attachment, and no judgment for the sale of the property can be rendered. The breach of the bond consists in the failure to perform the *personal judgment* *Dunn v. Crocker*, 22 Ind. 324. See Form 151 and notes.

2. Necessary allegations. *Dunn v. Crocker*, 22 Ind. 324.

3. Approval. The bond may be approved by the court, the sheriff, or the clerk. R. S. 1881, § 928.

COST BONDS.

153.—On undertaking for costs.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, brought his action against the plaintiff in the — Circuit Court.

That said defendant was then a non-resident of the State of Indiana, and before summons was issued filed his undertaking for the payment of costs, with the defendant, —, as his surety, a copy of which is filed herewith, and made a part of this complaint.

That said undertaking was approved by the clerk of said court, and filed in his office.

That this plaintiff, in the defense of said cause, was compelled to and did make and become liable for costs in the sum of — dollars.

That such proceedings were had in said cause that the same was dismissed at the costs of said defendant, and judgment was, on the — day of —, 18—, duly rendered in favor of this plaintiff against him for plaintiff's costs, in the sum of — dollars. [*If the plaintiff has paid his costs it should be alleged.*]

That said defendant has not paid said costs, or any part thereof, and the same is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Measure of damages. The plaintiff can only recover, in an action on the bond, his own costs, and only those for which he has become legally liable. *Goodwin v. Smith*, 68 Ind. 301; *Hiett v. Davis*, 88 Ind. 372; *Armsworth v. Scotten*, 29 Ind. 495; *Hays v. Boyer*, 59 Ind. 341; ante, vol. 1, § 1028.

2. Necessary allegations. *Goodwin v. Smith*, 68 Ind. 301; *Hiett v. Davis*, 88 Ind. 372.

3. Covers costs in Supreme Court. Where an appeal is taken to the Supreme Court the undertaking covers costs on appeal. *Hendricks v. Carson*, 97 Ind. 245.

4. Clerk must approve. R. S. 1881, § 589; ante, vol. 1, § 1028.

5. When undertaking must be given. Ante, vol. 1, § 1028.

DELIVERY BONDS.

154.—On bond for delivery of property taken on execution.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff recovered a judgment in the — Circuit Court against the defendant, —, for — dollars.

That on the — day of —, 18—, execution was duly issued on said judgment, and levied on the following property of said defendant [*describe the property*].

That said defendant demanded a delivery of said property to him, and to procure the same, executed to the plaintiff, with defendant, —, as his surety, his delivery bond, a copy of which is filed herewith, and made a part of this complaint.

That said bond was delivered to and approved by the sheriff, and the property thereupon delivered to said defendant.

That said property had theretofore been appraised at — dollars [*or, if the property has not been appraised, say: the fair value of said property was — dollars*].

That the property was not delivered by said defendant to the sheriff at the time and place named in said bond, nor did he pay its appraised value [*or, if not appraised, say: nor did he pay its fair value*], or any part thereof, though such delivery and payment was demanded by the sheriff.

That no part of the amount due upon said judgment and execution has been paid, and the same remains wholly unsatisfied.

That on the — day of —, 18—, the sheriff returned said bond to the clerk's office for the use of the plaintiff, indorsed "forfeited."

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. **Measure of damages.** R. S. 1881, § 748; ante, vol. 2, § 1154; *Hunter v. Brown*, 68 Ind. 225.
2. **When property must be appraised.** Ante, vol. 2, § 1154.
3. **Necessary allegations.** *Eldridge v. Yantes*, 6 Blkf. 72; *Hunter v. Brown*, 68 Ind. 225.
4. **Defective bond may be reformed.** *Bell v. Tanquy*, 46 Ind. 49.
5. **Demand, when necessary.** *Hunter v. Brown*, 68 Ind. 225.
6. **Parties.** Who may join as plaintiffs where a levy is made under several executions. *Koeniger v. Creed*, 58 Ind. 554.
7. **Defective bond cured.** *Koeniger v. Creed*, 58 Ind. 554.
8. **Does not affect defendant's right of redemption.** *Eltzrott v. Webster*, 15 Ind. 21.

INJUNCTION.

155.—On bond to enjoin defendant from carrying on business.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant brought his action against the plaintiff, in this court [*or, the — Circuit Court*], and praying for a temporary injunction [*or, restraining order*], restraining the plaintiff from carrying on his business as [*state the business*].

That to procure the same, the defendant executed his written undertaking to the approval of the court [*or, if in vacation, to the approval of the judge of said court*], with the defendant, —, as his surety, a copy of which is filed herewith, and made a part of this complaint, conditioned for the payment of all damages and costs which might accrue by reason of said injunction [*or, restraining order*].

That upon the execution of said undertaking, said injunction [*or, restraining order*] was granted, and the plaintiff restrained from carrying on his said business from that time until the — day of —, 18—, when judgment was rendered in said cause in favor of plaintiff against said defendant, said injunction [*or, restraining order*] was dissolved, and judgment rendered in favor of this plaintiff for — dollars, his costs in said injunction proceeding.

That by reason of said injunction [*or, restraining order*] plaintiff was prevented from carrying on his said business and thrown out of employment, by which he was damaged in the sum of — dollars, and was compelled to pay out — dollars as attorneys' fees and expenses in defending said proceeding, and [*state any other special damages*] none of which has been paid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of undertaking.*]

[*Signature.*]

1. Necessary allegations. *Winship v. Clendenning*, 24 Ind. 439; *Cress v. Hook*, 73 Ind. 177.

2. Measure of damages. *Winship v. Clendenning*, 24 Ind. 439; *Swan v. Timmons*, 81 Ind. 243; *Raupman v. The City of Evansville*, 44 Ind. 392; *Bates' Ohio Prac.* 353.

3. Bonds liberally construed and defects cured by statute. *Ante*, vol. 2, § 1440.

4. What amounts to a breach of the bond. *Swan v. Timmons*, 81 Ind. 243; *Dowling v. Polack*, 18 Cal. 626.

LIQUOR LAW BOND.

156.—For failure to pay fine and costs.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, applied to the board of commissioners of — county, State of Indiana, for a license to sell intoxicating liquors in less quantities than a quart at a time, to be drank on the premises in [*describe the house in the words of the application for license*].

That said defendant, with the defendants, — and —, as his sureties, executed and filed with the auditor of said county a bond in the penal sum of \$2,000, conditioned that he would keep an orderly and peaceable house, and pay all costs that might be assessed against him for any violations of the provisions of an act entitled, an act to regulate the sale of spirituous, vinous, and malt and other intoxicating liquors, and for the payment of all judgments for civil damages growing out of unlawful sales, as provided for in said act, a copy of which bond is filed herewith, and made a part of this complaint.

That, by an order of said board of commissioners a license was granted to said defendant.

That said bond was approved by the auditor, and a license issued by him to said defendant on the — day of —, 18—, for a term of one year, as provided in said act.*

That on the — day of —, 18—, said defendant commenced business under said license, and on the — day of —, 18—, was convicted by the — Circuit Court of selling intoxicating liquors to a minor while doing business under said license and in violation of said act, and a fine of — dollars and costs, amounting to the sum of — dollars, was duly adjudged against him by said court.

That said fine and costs have not been paid or replevied by said defendant, but said judgment is wholly unsatisfied.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

157.—For recovery of amount of judgment for civil damages.

[*Follow Form 156 to *, and continue*]. That said defendant, under said license, commenced business in said building, and on the — day of —, 18—, the relator recovered a judgment for civil damages against him in the — Circuit Court, in the sum of — dollars and costs, amounting to the sum of — dollars, for having sold intoxicating liquors to —, the relator's husband, while in a state of intoxication, during the time he was doing business under said license, and in violation of said act.

That no part of said judgment has been paid, but the same is now due and wholly unsatisfied.

Wherefore, etc.

[*Signature.*]

[*Copy of bond.*]

158.—Keeping a disorderly house.

[*Follow Form 156 to *, and continue*]. That said defendant, under said license, commenced business in said building on the — day of —, 18—, and has ever since kept said house in a disorderly manner, in this : That he has permitted and suffered divers persons, on week days and Sundays, to congregate in and about said building, and gamble and make a great noise, by yelling, quarreling, loud talking, swearing, and fighting.

That the relator is, and was during all of said time, the owner of a tenement house adjoining said building, that was rented to various persons, from which he was realizing the sum of — dollars per month.

That, by reason of the manner in which said house was kept by the defendant, said tenants were unable to and would not occupy relator's said tenement house, and abandoned the same, and for the same reason he has been unable to rent the same to other tenants, and the same has been vacant for — months, whereby the relator has been damaged in the sum of — dollars.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Who may sue on the bond. R. S. 1881,¹ § 5323; *Mitchell v. Ratts*, 57 Ind. 259; *Kane v. The State*, 58 Ind. 103; *Schlosser v. The State*, 55 Ind. 82.

2. Necessary allegations. *Kane v. The State*, 58 Ind. 103; *Schafer v. The State*, 49 Ind. 460; *Schlosser v. The State*, 55 Ind. 82.

3. Action against licensee individually. See *Liquors*, post, p. 209 *Mitchell v. Ratts*, 57 Ind. 259.

4. Joinder of causes. *Baker v. McCoy*, 58 Ind. 215.

NE EXEAT.

159.—On bond given by plaintiff to procure the writ.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, brought his action before —, a justice of the peace of — township, — county, Indiana, against the plaintiff, upon a written contract, before the time for the performance thereof expired, filed his affidavit, stating that [*set out the grounds*], and executed and filed with said justice his bond, with the defendant, —, as his surety, conditioned that he would pay the plaintiff such damages and costs as he should wrongfully sustain by occasion of said suit, a copy of which is filed herewith, and made a part of this complaint.

That said undertaking was duly approved by said justice.

That thereupon said justice issued an order of arrest and bail against plaintiff, and he was arrested thereunder by the constable.

That he was unable to give recognizance for his appearance, and was confined in the county jail for the space of — days.

That said defendant had no cause of action against plaintiff under said contract, and such proceedings were had before said justice that the plaintiff recovered a judgment against him that he take nothing by his action and for costs, amounting to — dollars.

That by reason of said arrest plaintiff was put to great expense in defending said action, in the sum of — dollars; was prevented, during the time he was imprisoned, from carrying on his business, by which he lost — dollars, and was injured in his good name and credit, by which he suffered damages in the sum of — dollars.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of undertaking.*]

[*Signature.*]

1. When writ may issue. R. S. 1881, § 1178; ante, vol. 2, § 1453.

2. May be amended. *Fitzgerald v. Gray*, 59 Ind. 254.

160.—On recognizance of defendant.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff brought his action against the defendant, —, in the — Circuit Court, upon a promissory note not then due, and filed his affidavit and undertaking with the clerk for an order of arrest and bail against said defendant; whereupon, said order of arrest was duly issued, and said defendant arrested thereunder by the sheriff.

That to procure his release from said arrest he, with the defendant, —, as his surety, executed to the plaintiff, and delivered to the sheriff, his recognizance, conditioned that he would personally appear on the first day of the next term of said court, and abide the order of the court, a copy of which is filed herewith, and made a part of this complaint.

That said sheriff duly approved said recognizance, and thereupon released said defendant from arrest, and returned the same to the clerk's office.

That said defendant did not appear at the first day of the next term of said court, or at all, and the plaintiff recovered judgment against him in said action by default, in the sum of — dollars and costs, taxed at — dollars.

That said defendant has not paid said judgment, or any part of it, but the same remains wholly unsatisfied.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of recognizance.*]

[*Signature.*]

1. **Necessary allegations.** Fitzgerald v. Gray, 59 Ind. 254; Fitzgerald v. Gray, 61 Ind. 109.

2. **Defective cured by statute.** Fitzgerald v. Gray, 59 Ind. 254.

REPLEVIN.

161.—On bond of plaintiff.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, brought his action in this court [*or, the — Circuit Court*] against plaintiff for the recovery of personal property.

That a writ was duly issued and said property taken thereunder, and the plaintiff herein having failed to give bond within twenty-four hours thereafter the said defendant executed his bond, with the defendant, —, as his surety, a copy of which is filed herewith, and made a part of this complaint, conditioned that he would prosecute his action with effect, and return said property to this plaintiff, if return should be adjudged by the court, and that he would pay plaintiff all such sums of money as might be recovered in the action for any cause whatever [*or, if the condition is not in the words of the statute, state it as in the bond*].

That said bond was delivered to and approved by the sheriff, and said property delivered to said defendant.

That such proceedings were had in said cause that on the — day

of —, 18—, judgment was rendered therein in favor of plaintiff for — dollars damages and costs, taxed at — dollars, and that said property was of the value of — dollars

That on the — day of —, 18—, plaintiff caused execution to issue on said judgment, which was returned unsatisfied, and said judgment remains unpaid, and no part of said property has been returned.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of bond.*]

[*Signature.*]

1. Measure of damages. In order to entitle the plaintiff to recover the value of the property there must have been a judgment for its return in the action of replevin. *Thomas v. Irwin*, 90 Ind. 557; *Foster v. Bringham*, 99 Ind. 505.

2. Parties. Who may join as plaintiffs. *Thomas v. Irwin*, 90 Ind. 557.

162.—On bond of defendant.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff brought his action in this court [*or, in the — Circuit Court*] against the defendant, —, for the recovery of certain personal property.

That said property was taken on a writ of replevin, issued in said cause, and the said defendant, with the defendant, —, as his surety, executed and delivered to the sheriff his bond, conditioned that he would safely keep said property, and that the same should not in any way be injured or damaged, and that he would deliver the same to the plaintiff, if judgment should be rendered to that effect, and pay to plaintiff all sums of money he might recover in the action [*or state the language of the condition, as stated in the bond*], a copy of which is filed herewith, and made a part of this complaint.

That said bond was duly approved by the sheriff and said property returned to said defendant.

That such proceedings were had in said cause that plaintiff recovered judgment for the possession of said property, and that it was of the value of — dollars, and for — dollars damages for its detention, and for his costs, taxed at — dollars.

That said defendant did not safely keep said property, but carelessly and negligently kept the same, so that it was entirely lost and destroyed.

That said defendant has not paid the value of said property, or any part of it, or any part of said judgment for damages and costs, nor has he delivered to the plaintiff, or any one for him, said property, or

any part of it, and said judgment remains wholly due and unsatisfied.

Wherefore, plaintiff demands judgment for ——— dollars.

[*Copy of bond.*]

[*Signature.*]

1. Proceedings in replevin. See R. S. 1881, § 1266 et seq., § 1547 et seq.; ante, vol. 2, § 1489 et seq.

2. Before justice not having jurisdiction, bond void. *Caffrey v. Dudgeon*, 38 Ind. 512; *Sherry v. Foresman*, 6 Blkf. 56; *Byers v. The State*, 20 Ind. 47. But see *Coverdale v. Alexander*, 82 Ind. 503.

3. Necessary allegations. *Sammons v. Newman*, 27 Ind. 508; *Shappendocia v. Spencer*, 73 Ind. 133.

4. Bond not in double the value of the property. The fact that in an action before a justice of the peace the bond is not in double the value of the property does not render it invalid, nor can the obligees contradict the recitals in the bond for the purpose of showing such fact. *Bugle v. Myers*, 59 Ind. 73; *Trueblood v. Knox*, 73 Ind. 310; *Sammons v. Newman*, 27 Ind. 508; *Caffrey v. Dudgeon*, 38 Ind. 512; *Wiseman v. Lynn*, 39 Ind. 250; *Carver v. Carver*, 77 Ind. 498.

5. What will amount to a breach of the bond. *Wiseman v. Lynn*, 39 Ind. 250; *Brown v. Parker*, 5 Blkf. 291; *Wheat v. Catterlin*, 23 Ind. 85; *Waddell v. Bradway*, 84 Ind. 537; *Yelton v. Slinkard*, 85 Ind. 190.

6. Bond of married woman void as to her. *Coverdale v. Alexander*, 82 Ind. 503.

7. Measure of damages. *Mitchell v. Burch*, 36 Ind. 529; *Blackwell v. Acton*, 38 Ind. 425; *Stevens v. McClure*, 56 Ind. 384; *Robinson v. Shalzley*, 75 Ind. 461; *Whitney v. Lehmer*, 26 Ind. 503; *Noble v. Epperly*, 6 Ind. 468; *Yelton v. Slinkard*, 85 Ind. 190; *Woods v. Kessler*, 93 Ind. 356; *Smith v. Mosby*, 98 Ind. 445.

8. Bond given to sheriff and execution plaintiff jointly, effect of. *Foster v. Bringham*, 99 Ind. 505.

9. Dismissal of action of replevin by agreement. Where the action of replevin is compromised and dismissed accordingly, no action can be maintained on the bond. *Gerard v. Dill*, 96 Ind. 101.

But where there is simply an agreement that the action be dismissed without any compromise of the questions at issue in the action, it would seem that an action would lie, as the mere consent to the dismissal by the defendant should not deprive him of the right to recover his damages. The very fact that he is protected by the bond might be an inducement for him to consent to a dismissal, which would, unless waived by him, constitute a breach of the bond, rather than demand a trial and the chance of a judgment in his favor. *O'Neal v. Wade*, 3 Ind. 410. But see *Hollinsbee v. Richie*, 49 Ind. 261; *Gerard v. Dill*, 96 Ind. 101.

RECOGNIZANCE.

163.—For appearance in criminal case.

[Venue, court and term.]

The State of Indiana }
 v. }
 — and —. } Complaint.

The plaintiff complains of the defendant and alleges:

That on the — day of —, 18—, an indictment had been found and duly returned into the — Circuit Court, against the defendant, —, charging him with the crime of —.

That he was duly arrested by the sheriff, upon a warrant issued thereon, and to procure his release from imprisonment executed his recognizance with the defendant, —, as his surety, conditioned that he would appear at the first day of the next term of said court, to answer said charge, and abide the judgment of the court, a copy of which is filed herewith, and made a part of this complaint.

That said recognizance was accepted and approved by the sheriff, and said defendant released from custody, and said recognizance duly certified to and filed in the office of the clerk of said court and recorded.

That said defendant did not appear on the first day of the next term of said court, or at any other time [or, said defendant appeared on the first day of the next term of said court, and said cause proceeded to trial, but before the trial thereof was completed, said defendant absented himself from the state, and has not since appeared], [or, said cause was by said court continued from the first day of said term until the — day of —, 18—, said defendant being present and consenting thereto, at which time he did not appear].

That said defendant was duly called but made default, and said recognizance was by the court then duly forfeited, and the forfeiture thereof duly entered of record.

That no part of the amount due upon said recognizance has been paid.

Wherefore, plaintiff demands judgment for — dollars.

[Copy of recognizance.]

[Signature.]

1. **When void.** Byers v. The State, 20 Ind. 47; Adams v. The State, 48 Ind. 212; Adair v. The State, 1 Blkf. 200; Harris v. The State, 54 Ind. 2; Gasper v. The State, 11 Ind. 548; State v. Owens, 6 Blkf. 61; The State v. Montgomery, 7 Blkf. 221; McCarty v. The State, 1 Blkf. 338; Minor v. The State, 1 Blkf. 237; Ott v. The State, 35 Ind. 365; Hunter v. The State, 21 Ind. 351; Doe v. Harter, 1 Ind. 427; State v. Wenzel, 77 Ind. 428; State v. Gachenheimer, 30 Ind. 63; State v. Douglass, 69 Ind. 544; Winninger v. The State, 81 Ind. 51.

2. Necessary allegations. R. S. 1881, § 1722; *State v. Robb*, 16 Ind. 413; *Swinney v. The State*, 16 Ind. 309; *State v. Wenzel*, 77 Ind. 428; *Hawkins v. The State*, 24 Ind. 288; *Turner v. The State*, 66 Ind. 210; *Urton v. The State*, 37 Ind. 339; *Patterson v. The State*, 12 Ind. 86; *McClure v. The State*, 29 Ind. 359; *Black v. The State*, 58 Ind. 589; *Patterson v. The State*, 10 Ind. 296; *Votaw v. The State*, 12 Ind. 497; *Gachenheimer v. The State*, 28 Ind. 91; *Hannum v. The State*, 38 Ind. 32; *Hysinger v. Colman*, 5 Blkf. 596; *Shields v. Smith*, 78 Ind. 425; *State v. Winninger*, 81 Ind. 51; *State v. Thistlewaite*, 83 Ind. 317; *Fowler v. The State*, 91 Ind. 507; *Friedline v. The State*, 93 Ind. 366.

3. What will amount to a breach. *Wilson v. The State*, 6 Blkf. 212; *Fowler v. The State*, 91 Ind. 507.

4. What must contain. R. S. 1881, § 1644; *Ott v. The State*, 35 Ind. 365; *Patterson v. The State*, 12 Ind. 86; *The State v. Hammer*, 2 Ind. 371; post, Form —.

5. Failure of justice or sheriff to certify and file with clerk. An action may be maintained on the recognizance, although the justice has failed to certify and file the same with the clerk. R. S. 1881, §§ 1709, 1631; *Adams v. The State*, 48 Ind. 212; *Patterson v. The State*, 12 Ind. 86; *Gachenheimer v. The State*, 28 Ind. 91; *Hannum v. The State*, 38 Ind. 32.

It was held otherwise in *Urton v. The State*, 37 Ind. 339, but this case is clearly overruled by the later cases cited.

6. Approval and return. R. S. 1881, §§ 1705, 1708, 1709, 1631.

7. Forfeiture. R. S. 1881, § 1721; *Hannum v. The State*, 38 Ind. 32; *The State v. Robb*, 16 Ind. 413.

8. Who may prosecute, and in whose name. R. S. 1881, §§ 1722, 5864; *The State v. Schloss*, 92 Ind. 293; *Black v. The State*, 58 Ind. 589; *State v. Moore*, 26 Ind. 246; *Hawkins v. The State*, 24 Ind. 288.

9. When sheriff may take and approve. *Blackman v. The State*, 12 Ind. 556; *Votaw v. The State*, 12 Ind. 497; *McCole v. The State*, 10 Ind. 50.

10. When action on may be brought. *Williams v. The State*, 86 Ind. 400; *Glass v. The State*, 39 Ind. 205.

11. Power of city marshal or constable to accept recognizance. *Bray v. Tate*, 43 Ind. 60.

12. Measure of damages. *Turner v. The State*, 66 Ind. 210; *Rooksby v. The State*, 92 Ind. 71.

13. Action on, where must be brought. *State v. Vanvalkenburg*, 15 Ind. 185.

REPLEVIN BAIL.

164.—On bond for stay of execution.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff recovered a judgment against the defendant, —, in the — Circuit Court, for the sum of — dollars and — dollars costs.

That, to stay execution thereon, the defendant entered into an undertaking to the plaintiff, which was duly entered upon the records of

said court immediately following said judgment, a copy of which is filed herewith, and made a part of this complaint, conditioned for the payment of said judgment, interest, and costs.

That after the expiration of the time for which said judgment was stayed, to-wit, on the — day of —, 18—, execution was duly issued thereon, and has been returned no property found subject to execution.

That no part of said judgment, interest, or costs, has been paid, and the same is now due.

Wherefore, the plaintiff demands judgment for — dollars.

[*Copy of undertaking.*]

[*Signature.*]

1. **Necessary allegations.** Ante, vol. 1, § 1043.

2. **Reversal of judgment as to one of the judgment defendants.** The reversal of the judgment as to one releases the surety. *Baker v. Merriam*, 97 Ind. 539.

3. **How replevin bail must be entered.** Ante, vol. 1, § 1043.

4. **Effect of.** Ante, vol. 1, § 1041; *Baker v. Merriam*, 97 Ind. 599; *Malo-ney v. Newton*, 85 Ind. 565; *Hopper v. Lucas*, 86 Ind. 43.

SECTION XXIII.

BREACH OF PROMISE OF MARRIAGE.

165. On promise—Generally, or on particular day.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of the agreement of the plaintiff, she then being unmarried and over the age of eighteen years, to marry the defendant on request [*or, on the — day of —, 18—*], defendant promised to marry her [*or, promised to marry her on said day*].

That plaintiff has ever since been [*or, was on said day*] ready and willing to marry defendant.

That although a reasonable time had elapsed before this action [*omit this, if the promise was to be performed at a certain date*], yet defendant neglects and refuses to marry plaintiff [*and has married one —*], to plaintiff's damage — dollars, for which she demands judgment.

[*Signature.*]

1. **Is a common law action.** *Short v. Stotts*, 58 Ind. 29.

2. **Contract not within statute of frauds.** A contract to marry is

not within the statute of frauds, and need not be in writing. *Short v Stotts*, 58 Ind. 29; *Caylor v. Roe*, 99 Ind. 1.

But where the marriage contract is upon a condition which is within the statute, there can be no recovery. *Caylor v. Roe*, 99 Ind. 1.

3. When cause of action accrues. Ordinarily, the breach of the contract arises from a failure to perform it at the time agreed upon; but it is *held* that if the defendant has renounced the contract before the time fixed for its performance, a cause of action arises immediately. *Kurtz v. Frank*, 76 Ind. 594, *citing* *Burtis v. Thompson*, 42 N. Y. 246; *Holloway v. Griffith*, 32 Iowa, 409; S. C., 7 Am. Rep. 208, n; *Frost v. Knight*, L. R. 7 Exch. 111; S. C. 1 Moaks' Eng. Rep. 218.

4. Request by plaintiff when necessary. If the action is by a female, a request that the defendant should comply with his contract need not be alleged, unless the contract was to marry on plaintiff's request. It is enough to show that she was ready and willing to marry. If the action is by a male plaintiff, a request must be alleged. But in either case no request need be shown where it is alleged that the defendant has married another. *King v. Kerry*, 2 Ind. 402; *Graham v. Martin*, 64 Ind. 567; *Hunter v. Hatfield*, 68 Ind. 416; 2 Chitty's Pl. 205; *Clements v. Moore*, 11 Ala. 35; *Hook v. George*, 108 Mass. 324; *Short v. Stone*, 8 Q. B. 358; *Kurtz v. Frank*, 76 Ind. 594.

5. Seduction. Seduction may be alleged for the purpose of increasing the damages. *Cates v. McKinney*, 48 Ind. 562; *Haymond v. Saucer*, 84 Ind. 3.

6. Promise must be mutual. The complaint must show a mutual promise of marriage. *Cates v. McKinney*, 48 Ind. 562; *King v. Kerry*, 2 Ind. 402; *Wilds v. Bogan*, 57 Ind. 453.

7. Measure of damages. *Dryden v. Knowles*, 33 Ind. 148; *Wilds v. Bogan*, 57 Ind. 453; *Hunter v. Hatfield*, 68 Ind. 416; *Kurtz v. Frank*, 76 Ind. 594; *Haymond v. Saucer*, 84 Ind. 3.

8. Joinder of action for breach of promise and seduction. One action may be maintained for a breach of promise to marry and for seduction under the promise. *Haymond v. Saucer*, 84 Ind. 3.

But separate actions may be maintained for the breach of promise and for the seduction; and a recovery in one of the actions can not be pleaded as a bar to a recovery in the other. *Ireland v. Emerson*, 93 Ind. 1; See CRIMINAL CONVERSATION. p. 141; SEDUCTION, p. 289.

SECTION XXIV.

CHARTER PARTY.

166.—Failure to provide cargo.

[Caption and commencement.]

That on the — day of —, 18—, in consideration that plaintiff would send his steamboat, known as —, with all convenient speed to —, and there receive defendant's cargo, and carry the same to —, and there deliver it to —, defendant agreed, by charter party, a copy of which is filed herewith, and made a part of this complaint, to load her with a full cargo of —, at said — [first named port], defendant to be allowed — days for loading, and — days for discharging said cargo and also — days, if required, at — dollars per day, for demurrage, and to pay freight, at — dollars per ton, as follows:

That plaintiff has duly performed all the conditions of said contract on his part to be performed.

That defendant failed to provide a full cargo, and provided — tons of cargo only, whereas the capacity of said vessel was — tons.

That defendant kept said vessel on demurrage — days over and above the time agreed upon as aforesaid for loading, discharging, and demurrage, whereby plaintiff was for said time deprived of the use of said vessel, and incurred — dollars expense in maintaining and paying the crew, to plaintiff's damage — dollars, for which he demands judgment.

[Copy of charter party.]

[Signature.]

167.—Charterer against owner—Abandonment of voyage.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff and defendant, by a charter party, a copy of which is filed herewith and made a part of this complaint, agreed that the defendant's ship, known as the —, then at —, should sail to —, or so near there as she could safely get, with all convenient speed, and there load a full cargo of —, or other lawful merchandise, from the factors of the plaintiff, and carry the same to —, and there deliver the same on payment of freight.

That the plaintiff duly performed all the conditions of the contract on his part to be performed.

That the said ship did not, with all convenient speed, sail to —, or so near thereto as she could safely get; but the defendant caused said ship to deviate from and avoid said voyage to the plaintiff's damage — dollars, for which he demands judgment.

[*Copy of charter party.*]

[*Signature.*]

SECTION XXV.

COMMON CARRIER.

168.—On written contract or bill of lading.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was a common carrier of goods for hire from — to —, and on said day agreed in consideration of — dollars, then paid [*or, if price not agreed upon and not paid, say, in consideration of a reasonable reward to be paid*] by plaintiff to carry safely for plaintiff,* and to deliver to —, at —; and plaintiff then and there delivered to defendant, for that purpose, the following goods [*describe them*], then owned by plaintiff, of the value of — dollars, a copy of which agreement is filed herewith, and made a part of this complaint.

That defendant did not safely carry and deliversaid goods, but failed so to do, whereby said goods were wholly lost to plaintiff to his damage — dollars, for which he demands judgment.

[*Copy of contract or bill of lading.*]

[*Signature.*]

1. Bill of lading or other contract is the foundation of the action. Indianapolis, etc., R. R. Co. v. Renning, 13 Ind. 518; Lake Shore, etc., R. R. Co. v. Bennett, 89 Ind. 457; Hall v. The Pennsylvania Co., 90 Ind. 459; Bartlett v. The Pittsburg, etc., R. R. Co., 94 Ind. 281.

2. Where goods must be delivered. United States Ex. Co. v. Rush, 24 Ind. 403; Green and Barren River, etc., Co. v. Marshall, 48 Ind. 596.

3. Delivery in violation of conditions of bill of lading or other contract. McEwen v. The Jeffersonville, etc., R. R. Co., 33 Ind. 368; The Jeffersonville, etc., R. R. Co. v. Irvin, 46 Ind. 180; American Ex. Co. v. Fletcher,

25 Ind. 492; *American Ex. Co. v. Stack*, 29 Ind. 27; *Baltimore, etc., R. R. Co. v. McWhinney*, 36 Ind. 436; *McCulloch v. McDonald*, 91 Ind. 240.

4. Necessary allegations. *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *United States Ex. Co. v. Harris*, 51 Ind. 127; *Pennsylvania Co. v. Poor*, 163 Ind. 553.

5. Measure of damages. *Rogers v. West*, 9 Ind. 400; *Michigan Southern, etc., R. R. Co. v. Caster*, 13 Ind. 164.

169.—Failure to deliver within a reasonable time—Verbal contract.

[*Follow Form 168 to *, and continue*]. And to deliver to —, at —, within a reasonable time [*if the damages consist in fall of market prices, add, the same being, as defendant well knew, transported for purposes of sale in market*], and plaintiff then and there delivered to defendant, for that purpose, the following goods [*describe them*], of the value of — dollars, the property of plaintiff.

That defendant did not carry and deliver said goods within a reasonable time, and did not deliver the same until the — day of —, 18—, whereby plaintiff was deprived of the use of the same, and the same were diminished in value, to plaintiff's damage — dollars, for which he demands judgment. [Signature.]

170.—Failure to collect for goods shipped C. O. D.

[*Follow Form 168 to *, and continue*]. And to deliver to —, at —, on payment by said —, and not otherwise, of the sum of — dollars, and to pay over said sum to plaintiff; and plaintiff then and there delivered to defendant, for that purpose, the following goods [*describe them*], a copy of which agreement is filed herewith, and made a part of this complaint.

That defendant neglected and failed to collect said sum from said —, but delivered said goods to him without receiving payment of said amount, and has not paid the same over to plaintiff, nor has said sum or part thereof been paid, but is now due, to plaintiff's damage — dollars, for which he demands judgment.

[*Copy of contract.*]

[Signature.]

171.—Refusal to receive and carry freight.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was a common carrier for hire of goods from — to —, and on that day plaintiff tendered to defendant, at its depot in —, at a reasonable hour, the following goods properly packed [*describe them*], and requested defend-

ant to transport them to —, a station on the route of defendant's railroad, and tendered defendant the sum of — dollars, its charges therefor [*or*, offered to pay defendant its reasonable charges therefor].

That defendant had sufficient means and equipments to receive and carry said goods, but wrongfully refused to receive and carry the same, whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [*Signature.*]

1. Liability for refusal to carry goods. Pittsburg, etc., R. R. Co. v. Morton, 61 Ind. 539; Pittsburg, etc., Ry. Co. v. Hollowell, 65 Ind. 188; R. S. 1881, §§ 3925, 3926, and authorities cited in notes.

172.—Refusal to receive and carry passenger.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was a common carrier of passengers for hire from — to —.

That on said day, plaintiff tendered himself, with his reasonable baggage, to defendant, at its depot in —, at a reasonable time before the departure of a train, and in a fit and proper state, to be carried as passenger, and requested passage to —, a station on defendant's road, at which said train was announced to stop, and was then ready and willing to pay defendant its reasonable charges therefor, and defendant had sufficient means and equipments to receive and carry plaintiff, yet wrongfully refused to receive or carry plaintiff, to his damage — dollars, for which he demands judgment.

[*Signature.*]

1. Liability for refusal to carry passengers. R. S. 1881, §§ 3925, 3926, and cases cited in notes.

173.—Carrying passenger past station.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant was a common carrier of passengers for hire, and operating a line of railroad as such between — and —.

That on said day plaintiff purchased a ticket from defendant at —, entitling him to passage on said road from — to —, a station on said road, and took passage on defendant's cars for said station.

That said station at — was, by the rules and regulations of the defendant, a regular stopping place for its trains, and the train on which plaintiff took passage was accustomed to stop thereat.

[*Or*, That in consideration of plaintiff's buying said ticket, defend-

ant at the time promised and agreed to stop its train and put him off at said — station.]

That defendant neglected and refused to stop at said station, and did not let plaintiff off said train until its arrival at —, a station — miles beyond, whereby plaintiff was put to an expense of — dollars to return to said —, and [*state special damages*] to his damage — dollars, for which he asks judgment. [Signature.]

1. Necessary allegations. Pittsburg, etc., Ry. Co. v. Nuzum, 50 Ind. 141; The Columbus, etc., Ry. Co. v. Powell, 40 Ind. 37; The Ohio and Miss. Ry. Co. v. Applewhite, 52 Ind. 540; The Ohio and Miss. Ry. Co. v. Hatton, 60 Ind. 12.

See RAILROADS, p. 271.

SECTION XXVI.

COMPROMISE.

174.—General skeleton.

[*Caption and commencement.*]

That on the — day of —, 18—, a dispute [action], [arbitration] was pending between the parties hereto, wherein this plaintiff claimed that defendant owed him — dollars for — [had injured his land by overflowing to the amount of — dollars], which the defendant denied.

That, in consideration of the settlement of said dispute [dismissal of said action], it was mutually agreed that defendant would, on the — day of —, 18—, pay plaintiff, and plaintiff would accept — dollars in full satisfaction thereof.

That plaintiff has duly performed all the conditions of said contract on his part to be performed [and on the — day of —, 18—, dismissed said action].

That [*if no time for payment was fixed say*: a reasonable time for payment has elapsed, but] no part of said amount has been paid, and the same is now due.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

1. When compromise sufficient consideration for promise. Ante, vol. 1, § 597; Spahr v. Hollingshead, 8 Blkf. 415; Jarvis v. Sutton, 3 Ind. 289; Thompson v. Nelson, 28 Ind. 431; Smith v. Boruff, 75 Ind. 412; Schnell v. Nell, 17 Ind. 29; Coy v. Stucker, 31 Ind. 161; Hutton v. Stoddard, 83 Ind. 589.

SECTION XXVII.

CONTRACTS.

175.—General skeleton.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of —, defendant agreed with plaintiff to — [*if in writing, add: a copy of which agreement is filed herewith, and made a part of this complaint.*]

That plaintiff has duly performed all the conditions of said agreement on his part to be performed. [*If performance was not allowed by defendant, allege tender or offer to perform, thus: That on the — day of —, 18—, plaintiff tendered to defendant, — (or, offered to —), was ready and willing to receive.*]

That defendant has not — [*aver breach*].

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [*Signature.*]

[*Copy of agreement.*]

1. Performance of conditions by plaintiff, how alleged. R. S. 1881, § 370; ante, vol. 1, § 394; *Bertelson v. Bower*, 81 Ind. 512; *Fairbanks v. Meyers*, 98 Ind. 92; *Cromwell v. Wilkinson*, 18 Ind. 365.

2. Where defendant prevents or waives performance. It is necessary, where the contract requires the performance of conditions precedent by plaintiff, that the complaint should allege such performance. Ante, vol. 1, § 394; *Crane v. The Indiana, etc., Ry. Co.*, 59 Ind. 165.

But the requirement may have been waived or the performance prevented by the defendant. If so, the facts showing such waiver or prevention must be alleged. It is not enough to allege it in general terms, as in case of the performance. Ante, vol. 1, § 395; *Hawley v. Smith*, 45 Ind. 183; *Lane v. Albright*, 49 Ind. 275; *Durland v. Pitcairn*, 51 Ind. 426; *King v. King*, 69 Ind. 467; *Dwiggins v. Clark*, 94 Ind. 49; *Vinton v. Baldwin*, 95 Ind. 433; *Floyd v. Maddux*, 68 Ind. 124; *The Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *The Charlestown School Tp. v. Hay*, 74 Ind. 127; *Boyle v. Guysinger*, 12 Ind. 273.

3. Dependent and independent promises. As to what are dependent or independent promises, and the allegations of complaints in either case, see *Gillum v. Dennis*, 4 Ind. 417; *Johnson v. Powell*, 9 Ind. 566; *Pickens v. Bozell*, 11 Ind. 275; *Ireland v. Montgomery*, 34 Ind. 174; *Irwin v. Lee*, 34 Ind. 319; *McAlister v. Howell*, 42 Ind. 15; *Summers v. Sleeth*, 45 Ind. 598; *Bruce v. Smith*, 44 Ind. 1; *Clark v. The Continental, etc., Co.*, 57 Ind. 135; *Sibbitt v. Stryker*, 62 Ind. 41.

4. Breach, how alleged. The Johnston Harvester Co. v. Bartley, 81 Ind. 406; Booher v. Goldsborough, 44 Ind. 490; Thornton v. Burr, 90 Ind. 488; Branham v. Johnson, 62 Ind. 259.

Where the breach complained of is the non-payment of money the complaint must show the money to be due and unpaid. Ante, vol. 1, § 363; Goodman v. Gordon, 87 Ind. 126.

176.—On building contract.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of —, defendant made an agreement with plaintiff, a copy of which is filed herewith, and made a part of this complaint, whereby he agreed to erect and complete a building for plaintiff, with [*state the condotions, the breach of which is complained of*].

That plaintiff has duly performed all of the conditions of said agreement by him to be performed.

That defendant has failed to comply with said contract in the following particulars [*state the breaches*], to plaintiff's damage — dollars, for which he demands judgment. [Signature.]

[*Copy of contract.*]

1. Difference between "erecting" and "completing" building. McLaughlin v. Child, 62 Ind. 412.

177.—On building contract with parol changes and extra work.

[*Caption and commencement.*]

That on the — day of —, 18—, the parties hereto entered into a contract with each other, a copy of which is filed herewith and made a part of this complaint, whereby plaintiff agreed to erect and complete a house for defendant, in consideration whereof defendant was to pay — dollars as follows [*state the payments*].

That on the — day of —, 18—, said contract was altered by mutual consent as follows [*state how*].

That on the — day of —, 18—, at defendant's request, plaintiff, for a reasonable reward then promised, covered the roof with slate, whereas the contract provided for shingles.

That the difference in the price of shingles and slate would be — dollars.

That plaintiff also, at a like request, omitted a porch required by the contract, agreeing to make a reasonable déduction therefor, a reasonable deduction for which would be — dollars; and, on the — day of —, 18—, at a like request, and in consideration of — dol-

lars additional to be paid plaintiff, added a one story frame back building not called for in the original contract.

That in consideration of said alterations, the time for the completion of said building was extended to the — day of —, 18—.

That plaintiff has duly performed all of the conditions of said contract on his part to be performed.

That defendant has not paid the last two installments called for by said contract, nor has he paid the balance due for the extra work aforesaid, after deducting the said allowance, amounting in all to — dollars.

That said sum is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of contract.*]

[*Signature.*]

178.—For services under special contract, building not completed in time, but accepted.

[*Caption and commencement.*]

That on the — day of —, 18—, the parties hereto entered into a contract with each other, a copy of which is filed herewith, and made a part of this complaint, whereby plaintiff agreed to erect a house for defendant, and have the same completed and ready for occupation on the — day of —, 18—, in consideration of which defendant agreed to pay — dollars when the same was completed.

That plaintiff has duly performed all of the conditions of said contract on his part to be performed, except that said house was not completed on the — day of —, 18—, as agreed, but was completed on the — day of —, 18—, when the defendant accepted and took possession, and has ever since used and occupied the same.

The defendant has not paid said sum of — dollars, or any part thereof, and the same is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of contract.*]

[*Signature.*]

1. Failure to complete in time—Rights of the parties. McClure v. Secrist, 5 Ind. 31; Adams v. Cosby, 48 Ind. 153; Branham v. Johnson, 62 Ind. 259; Heath v. West, 68 Ind. 548.

2. Must show something due and unpaid. Goodman v. Gordon, 87 Ind. 126.

179.—For price of personal property sold.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant entered into an agreement, whereby plaintiff sold to defendant, for the sum of — dollars, the following described personal property, to be

delivered to defendant at the railroad depot on the — day of —, 18—, to wit [*describe it*].

That defendant paid on said property, at the time of the agreement, the sum of — dollars, and agreed to pay therefor the additional sum of — dollars on the — day of —, 18—.

That plaintiff fully complied with the conditions of said contract, and delivered said property at the railroad depot at —, on the — day of —, 18—, and tendered the same to the defendant, who refused to accept or pay for the same.

That said sum of — dollars is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

1. Necessary allegations. In order to recover the contract price, the vendor must have done such acts on his part as would have vested the title in the vendee, if he had consented to accept. He can not retain the title to the goods and recover their full value. *The Pittsburg, etc., Ry. Co. v. Heck*, 50 Ind. 303; *Fell v. Muller*, 78 Ind. 507; *Schrieber v. Butler*, 84 Ind. 576.

See SALES, p. —.

180.—For failure to accept personal property sold.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant entered into a written contract, a copy of which is filed herewith, and made a part of this complaint, by which defendant agreed to purchase from plaintiff — car loads of —, at — dollars per ton, to be shipped to said —, at —, at such times as said defendant should request, between the — day of —, 18—, and the — day of —, 18—, payment to be made for each car load at the time of delivery.

That plaintiff was, at all times between the — day of —, 18—, and the — day of —, 18—, ready and willing to deliver said —, as the same might be requested by the defendant, and in all things to comply with said contract on his part, and so notified the defendant.

That he might have sold the same to other parties for the full amount agreed to be paid by defendant, but kept the same on hand for shipment to defendant, in compliance with said contract.

That defendant did not, at any time, request the shipment of said —, or any part of it, and at the end of the time agreed upon for its shipment refused to receive or pay for the same.

That said — had decreased in value, so that plaintiff could only realize therefor the sum of — dollars [*or, said — being of a per-*

ishable nature had, when the time for the shipment to defendant expired, become wholly worthless].

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment.

[Signature.]

[Copy of contract.]

1. Necessary allegations. The Pittsburg, etc., Ry. Co. v. Heck, 50 Ind. 303; Fell v. Muller, 78 Ind. 507; Schreiber v. Butter, 84 Ind. 576.

2. Measure of damages. The Pittsburg, etc., Ry. Co. v. Heck, 50 Ind. 303; Fell v. Muller, 78 Ind. 507.

3. Failure to deliver goods. Beard v. Sloan, 38 Ind. 128.

For other forms of complaints on contracts, see under PARTICULAR CONTRACTS; SALES, p. 283-9.

SECTION XXVIII.

CONVERSION.

181.—General Form.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff was lawfully possessed, as of his own property, of — [or, was the owner and entitled to the immediate possession of] [describe the chattels converted], of the value of — dollars.

That on said day the defendant took and carried away said property, and unlawfully converted and disposed of the same to his own use.

[Or, defendant, being in possession of said property, unlawfully converted and disposed of the same to his own use.]

Whereby the plaintiff was damaged in the sum of — dollars, for which he demands judgment.

[Signature.]

182.—Conversion of bond.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff, being the owner of a certain bond, made by —, for — dollars, payable on —, to —, deposited the same with defendant on an agreement that defendant would ascertain its value and buy it from plaintiff at its value, or return it to him on demand.

That after a reasonable time for ascertaining its value, to wit, on the — day of —, 18—, plaintiff demanded said bond or its value, but defendant refused.

The value of said bond at the time of said refusal was — dollars, for which plaintiff demands judgment. [Signature.]

183.—By bailee for goods taken from his possession.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff was in the rightful possession of the following goods, the property of —, and as his bailee, to wit [*describe property*], of the value of — dollars.

That on said day defendant took and carried away said property, and unlawfully converted and disposed of the same to his own use.

Whereby the plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. Necessary allegations. Proctor v. Cole, 66 Ind. 576; Hutchings v. Castle, 48 Cal. 152; Triscony v. Orr, 49 Cal. 612; Bates' Pl. and Par. 385 et seq.

2. Demand not necessary. Ante, vol. 1, § 262; Robinson v. Skipwith, 23 Ind. 311; Proctor v. Cole, 66 Ind. 576; Hon v. Hon, 70 Ind. 135; Buntin v. Pritchett, 85 Ind. 247.

3. Plaintiff may waive the tort and sue as upon contract. Ante, vol. 1, sec. 355; Cooper v. Helsaback, 5 Blk. 14; Jones v. Gregg, 17 Ind. 84; Morford v. White, 53 Ind. 547.

4. Measure of damages. Tea v. Gates, 10 Ind. 164; Pratt v. Boyd, 17 Ind. 232; The Bank of the State v. Burton, 27 Ind. 426; Ellis v. Wire, 33 Ind. 127; Hazzard v. Duke, 64 Ind. 220; Schindler v. Westover, 99 Ind. 345.

5. Title necessary to maintain action. Bowen v. Sullivan, 62 Ind. 281; Stephenson v. Teezer, 55 Ind. 416; Dufour v. Anderson, 95 Ind. 302; Bates' Pl. and Par. 383, and cases cited; Tomlinson v. Bricklayers' Union, etc., 87 Ind. 308.

6. What constitutes a conversion. Gordon a. Stockdale, 89 Ind. 240; Shearer v. Evans, 89 Ind. 400; Schindler v. Westover, 99 Ind. 395.

7. Where action may be brought. Shearer v. Evans, 89 Ind. 400.

8. When defendants jointly liable. Ferrell v. Butterfield, 92 Ind. 1.

SECTION XXIX.

CORPORATIONS.

184.—By Stockholder for misappropriation of corporate property.

[*Caption and commencement.*]

That the defendant, the ——— Railway Company, is a corporation duly incorporated under the laws of Indiana, and owns and operates a railroad in this state, between ——— and ———, with all the cars, locomotives, and other equipments appurtenant to a railroad.

That plaintiff is, and has been for ——— years, the owner and holder of ——— shares of the capital stock of said company, of a par value of ——— dollars, and brings this action on behalf of himself and the other stockholders of said ——— Railway Company.

That about the ——— day of ———, 18—, said company then doing a prosperous business, the defendants, ———, ———, and ———, being directors, for their own gain and advantage, and to defraud the plaintiff and other stockholders, unlawfully and fraudulently conveyed ——— cars and ——— locomotives to the defendant ———, also a corporation under the laws of this state, at less than their value, to wit, a nominal consideration of ——— dollars; but as a part consideration therefor said directors, ———, ———, and ———, secretly received, for their own use, ——— shares in the stock of said last named company, at a nominal consideration of ——— dollars, but in reality without consideration.

That the defendants, said directors, had no right, power, or authority, to sell or deliver said property, which was well known by said ——— at the time, and said sale was made and consummated under some secret and fraudulent agreement between said directors and said ———, the terms of which are unknown to plaintiff.

That afterward, on the ——— day of ———, 18—, said directors, still being large stockholders in said ———, as aforesaid, made a pretended contract, on behalf of the ——— Railway Company, with said ———, whereby, for a consideration of ——— dollars per annum, said ——— should run its cars over said railway and have the exclusive carriage of all the [*state terms, and state in what way a wrong to plaintiff and stockholders, and complicity of the other corporation*].

That on the — day of —, 18—, plaintiff duly demanded of the board of directors of the — Railway Company to take action or proceedings to recover back said cars and locomotives from the said —, and for the annulling of said contract, but said corporation and said directors neglect and refuse so to do.

Wherefore, plaintiff, for himself and for the other stockholders interested with him, asks that said fraudulent sale be set aside, and said property be ordered to be returned, and said contract be declared null and void, and its operation enjoined, and for all other proper relief.

[*Verification.*]

[*Signature.*]

185.—For misconduct of officers.

[*Caption and commencement.*]

That the defendant, —, is a corporation, organized and doing business under the laws of this state.

That plaintiffs and defendants, —, —, —, and —, are the only stockholders of said company.

That said defendant, —, is and has been since — the president of said company, and he and said defendants, —, —, and —, directors thereof.

That said —, in combination with said —, —, and —, directors, illegally converted to his own use and misappropriated all the surplus earnings of said corporation, by wrongfully procuring the payment to him of a pretended salary of — dollars per annum, which he has received and retained for — years, and by procuring payment for labor for his individual benefit [*describe what*], and by loaning the funds of said corporation to himself, on insufficient security, in the sum of — dollars, and by false entries in the books has defrauded said company out of large sums.

In consequence whereof, the capital stock of said company, which consists in — shares of — dollars each has greatly depreciated in value, and have been reduced by said misconduct of said — and the complicity of the defendants, —, —, and —, from a market value of — dollars per share to be wholly worthless; the stockholders have been deprived of dividends amounting to — dollars, and the amount loaned to said defendant has been entirely lost.

That plaintiffs, on the — day of —, 18—, duly requested said corporation to bring this action against said defendants, but said corporation neglects and refuses so to do.

Wherefore, plaintiffs demand judgment for an accounting and for — dollars damages against said defendants, —, —, —, and —, and for all other proper relief.

[*Signature.*]

1. Parties. The general rule is that an action may be maintained by a stockholder in this class of cases, but that it must be after requesting the corporation to bring the action and its refusal. It must be brought in terms for himself and other stockholders, and the corporation must be made a party. *House v. Cooper*, 16 How. Pr. 292; *Greaves v. Gouge*, 69 N. Y. 154; *Smith v. Rathbun*, 66 Barb. 402; *Brewer v. Boston Theater*, 104 Mass. 378. But see *Rogers v. The Lafayette Agricultural Works*, 52 Ind. 296, where the making of all the stockholders parties was held to be a compliance with the rule that the action must be brought for all, and that under the circumstances of that case it was not necessary to show a request that the corporation should bring the action and its refusal.

If it is shown that a request upon the corporation would have been useless, this has been held to be sufficient. *Brewer v. Boston Theater*, 104 Mass. 378.

For a wrongful conversion of the property of the corporation a stockholder can not maintain an action, although the conversion is by other members. The action must be brought by the corporation. *Tomlinson v. Bricklayers' Union*, etc., 87 Ind. 308.

186.—For dividends on shares wrongly transferred to another.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant was, and is now, a corporation, duly incorporated under the laws of Indiana.

That on said day defendant issued to one — a certificate, numbered —, for — shares of its stock, of the par value of — dollars per share, transferable by the laws of the company on its books on the surrender of the certificate.

That on the — day of —, 18—, said —, for value sold and transferred said certificate to one —, and indorsed a power of attorney thereon, authorizing a transfer to him of said shares.

That no such transfer was ever made, and on the — day of —, 18—, said — died, and said certificate came into possession of plaintiff as his administrator, but by reason of said —'s having mislaid the same it was not known to or found by plaintiff until —.

That on the — day of —, 18—, on the representation of said — that he was still the owner of said certificate, but had lost the same, he procured defendant to issue to him another certificate in lieu thereof.

That since said last date defendant has paid sundry dividends on said shares to said —, in stock and in money, to wit, [*enumerate dates and amounts*], no part of which has ever been paid by said — to — or to plaintiff.

Wherefore, plaintiff brings said certificate and the indorsement of the power of attorney as aforesaid into court, and asks that defendant

be compelled to issue a new certificate of stock to him in lieu thereof, and that defendant be adjudged to pay plaintiff said amounts in stock and cash paid to said —, to wit, — dollars, and for all other proper relief. [Signature.]

187.—For illegal expulsion of member.

[Caption and commencement.]

That the defendant is a corporation, duly incorporated under the laws of this state, for the purpose of furnishing relief to its members by paying them — dollars per week, when sick, out of the dues assessed by it on all the members, amounting to — dollars per annum from each.

That plaintiff has been, ever since the — day of —, 18—, a member of said corporation, and in the enjoyment of the rights and privileges of such membership, until the — day of —, 18—, on which date, at a regular meeting of the society, and by a majority vote thereof, plaintiff was illegally and without cause expelled from membership, and the vote was so recorded, and plaintiff has been ever since denied the rights and privileges of membership, to his damage — dollars, for which he demands judgment. [Signature.]

For further forms applicable to corporations, see BANKS; COMMON CARRIERS; INSURANCE; MUNICIPAL CORPORATIONS, and RAILROADS.

SECTION XXX.

COVENANTS.

188.—On covenant against incumbrances.

[Caption and commencement.]

That on the — day of —, 18—, defendant, in consideration of — dollars, conveyed to plaintiff by deed in fee-simple, a copy of which is filed herewith and made a part of this complaint, the real estate therein described, and in said deed covenanted that the title so conveyed was clear, free, and unincumbered.

That at the time of making and delivering said deed said premises were subject to — [describe the incumbrance, e. g.], a mortgage made

by — to —, dated —, 18—, securing a note for — dollars, with — per cent interest from —, recorded in book —, page —, recorder's office, — county, which was at the date of said conveyance wholly unpaid.

That on the — day of —, 18—, said — brought his action in the — Circuit Court to foreclose said mortgage, making this plaintiff a party thereto, and such proceedings were had therein that a decree was rendered foreclosing said mortgage, and an order of sale was issued thereon, and plaintiff was compelled to pay the amount of said decree, and interest amounting to — dollars, to prevent the sale of said property thereunder [*or, and said real estate was, on the — day of —, 18—, [sold by the sheriff to one — for — dollars, and, on the — day of —, 18—, said purchaser received a deed therefor, and thereafter evicted the plaintiff therefrom.]*].

[*Or, That plaintiff was compelled to and did, on the — day of —, 18—, pay the sum of — dollars to extinguish said mortgage.*]

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

[*Copy of deed.*]

1. Necessary allegations. *Sheets v. Longlois*, 69 Ind. 491; *Martin v. Baker*, 5 Blkf. 232; *Barker v. Hobbs*, 6 Ind. 385.

2. Measure of damages. If the plaintiff has not paid the incumbrance, or been evicted, he can only recover nominal damages. *Reasoner v. Edmundson*, 5 Ind. 393; *Black v. Coan*, 48 Ind. 385; *Clark v. Snelling*, 1 Ind. 382; *Bundy v. Ridenour*, 63 Ind. 406.

But the grantee may pay off the incumbrance, when the measure of his damages will be the amount he has been compelled to pay to protect his title and interest. *Snyder v. Lane*, 10 Ind. 424; *Kent v. Cantrall*, 44 Ind. 452; *Dunkle-barger v. Whitehall*, 70 Ind. 214; *Small v. Reeves*, 14 Ind. 163; *Burk v. Clements*, 16 Ind. 132.

Or if the property is sold and bid in by him, the amount of his bid, with interest. *Burk v. Clements*, 16 Ind. 132.

Or he may show an actual eviction or a surrender of possession to avoid an inevitable eviction, and recover his actual damages. *Marvin v. Applegate*, 18 Ind. 425.

3. Notice of incumbrance by grantee. The grantee may recover upon an express covenant against incumbrances, although he knew of the incumbrance at the time he received the deed. *Medler v. Hiatt*, 8 Ind. 171; *Burk v. Hill*, 48 Ind. 52.

But it may be shown by parol that the incumbrance was not intended to be included in the covenant. *Medler v. Hiatt*, 8 Ind. 171; *Pitman v. Conner*, 27 Ind. 337; *Page v. Lashley*, 15 Ind. 152; *Allen v. Lee*, 1 Ind. 58; *Fitzer v. Fitzer*, 29 Ind. 468; *Robinius v. Lister*, 30 Ind. 142; *McDill v. Gunn*, 43 Ind. 315; *Headrick v. Wisheart*, 57 Ind. 129.

And where the land sold is known by the grantee to be in the possession of a

tenant, such possession will be presumed not to be within the covenant. *Lindley v. Dakin*, 13 Ind. 388; *Snodgrass v. Smith*, 13 Ind. 393.

4. What amounts to an incumbrance. *Burk v. Hill*, 48 Ind. 52.

5. Parties entitled to sue. In case of the death of the grantee, if the damages for the breach accrue *before* his death, the action must be brought by his executor or administrator; if the damages accrue *after* his death, the heir must sue. *Frink v. Bellis*, 33 Ind. 135.

The cause of action for the breach may be assigned, and an action maintained thereon by the assignee. *Martin v. Baker*, 5 Bk. 232.

6. Runs with the land. *Dehority v. Wright*, 101 Ind. 382.

189.—By heir of subsequent grantee on covenants of statutory warranty deed.

[Caption and commencement.]

That on the — day of —, 18—, in consideration of — dollars, the defendant, by his deed in fee-simple, a copy of which is filed herewith, and made a part of this complaint, conveyed and warranted to A. B. the real estate therein described.

That on the — day of —, 18—, said A. B., for a valuable consideration, conveyed said premises by warranty deed to C. D., and said C. D. thereupon became possessed of the same.

That on the — day of —, 18—, said C. D. died in the county of —, State of Indiana, leaving a last will and testament, whereby he devised said property to E. F., which will was, on the — day of —, 18—, duly admitted to probate in said county, and said E. F. thereupon became possessed of said property.

That on the — day of —, 18—, said E. F. died at —, intestate, leaving the plaintiff as his only child and heir at law, and thereupon said premises descended to plaintiff.

The plaintiff alleges the following breaches of the covenants of said deed :

1. That, at the time the same was executed and delivered to said A. B., one G. H. held and owned a paramount title in fee simple to the north half of said real estate, and, on the — day of —, 18—, lawfully entered upon said premises thereunder, and evicted the plaintiff, and ousted him from the possession thereof.

2. That, at the time said deed was made and delivered, one I. J. held a mortgage on the south-east quarter of said real estate for — dollars, which was duly recorded in the recorder's office of said county on the — day of —, 18—, and was a valid lien thereon.

That on the — day of —, 18—, plaintiff was compelled to and did pay to said I. J., the sum of — dollars, to extinguish said mortgage, no part of which has been repaid to plaintiff.

3. That, at the date of said deed, one K. L. had a prior and paramount title in fee simple in the south-west quarter of said real estate,

and in an action in the — Circuit Court against this plaintiff [*if so, say, of which action plaintiff gave defendant due notice, and requested him to defend the same*], judgment was, on the — day of —, 18—, given in favor of said K. L. against this plaintiff for possession thereof, and, on the — day of —, 18—, by virtue of said judgment, said K. L. took possession and evicted plaintiff, to his damage — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of deed.*]

[*Signature.*]

1. Several breaches may be assigned in same paragraph. *Sheets v. Longlois*, 69 Ind. 491.

2. The deed is the foundation of the action, and must be made part of the complaint. *Ante*, vol. 1, §§ 418, 619.

3. Necessary allegations. *Ante*, vol. 1, § 409; *Martin v. Baker*, 5 Blkf. 232; *Hannah v. Henderson*, 4 Ind. 174; *Reese v. McQuilkin*, 7 Ind. 450; *Jordan v. Blackmore*, 20 Ind. 419; *Rhode v. Green*, 26 Ind. 83; *Blair v. Allen*, 55 Ind. 409; *Walton v. Cox*, 67 Ind. 164; *Wilson v. Peele*, 78 Ind. 384; *Axtel v. Chase*, 83 Ind. 546; *Woodford v. Leavenworth*, 14 Ind. 311; *McClure v. McClure*, 65 Ind. 482; *Sheets v. Longlois*, 69 Ind. 491; *Marvin v. Applegate*, 18 Ind. 425; *Hooker v. Folsom*, 4 Ind. 90; *Craig v. Donovan*, 63 Ind. 513; *Fisher v. Parry*, 68 Ind. 465; *Mason v. Cooksey*, 51 Ind. 519; *Dowell v. Caffron*, 68 Ind. 196; *Chance v. Callingbaugh*, 47 Ind. 250; *Gordon v. Goodman*, 98 Ind. 269.

4. When covenant runs with land—Who may sue and be sued. *Martin v. Baker*, 5 Blkf. 232; *Blair v. Allen*, 55 Ind. 409; *Wilson v. Reece*, 78 Ind. 384; *Morgan v. Muldoon*, 82 Ind. 347; *McClure v. McClure*, 65 Ind. 482; *Craig v. Donovan*, 63 Ind. 513; *Bethel v. Bethel*, 54 Ind. 428; *Burnham v. Lasselie*, 35 Ind. 425; *Battorf v. Smith*, 7 Ind. 673; *Sage v. Jones*, 47 Ind. 122; *The Junction R. R. Co. v. Sagers*, 28 Ind. 318; *Bloch v. Isham*, 28 Ind. 37; *Carley v. Lewis*, 24 Ind. 23; *Coleman v. Lyman*, 42 Ind. 289; *Taylor v. Owen*, 2 Blkf. 301; *Gronendyke v. Cramer*, 2 Ind. 382; *Fisher v. Parry*, 68 Ind. 465; *Graber v. Duncan*, 79 Ind. 565; *Clark v. Lineberger*, 44 Ind. 223; *Dehority v. Wright*, 101 Ind. 382.

5. What will amount to an eviction. *Hannah v. Henderson*, 4 Ind. 174; *Axtel v. Chase*, 83 Ind. 546; *Mooney v. Burchard*, 84 Ind. 285; *Reasoner v. Edmundson*, 5 Ind. 393; *McClure v. McClure*, 65 Ind. 482; *Walton v. Cox*, 67 Ind. 164; *Sheets v. Longlois*, 69 Ind. 491; *Marvin v. Applegate*, 18 Ind. 425; *Vaughn v. Stuzaker*, 16 Ind. 338.

6. Measure of damages. *Reese v. McQuilkin*, 7 Ind. 450; *Blair v. Allen*, 55 Ind. 409; *Wilson v. Peele*, 78 Ind. 384; *Phillips v. Reichert*, 17 Ind. 120; *Hort v. Spade*, 20 Ind. 326; *Mooney v. Burchard*, 84 Ind. 285; *Lacey v. Marnan*, 37 Ind. 168; *Studebaker v. White*, 31 Ind. 211; *McClure v. McClure*, 65 Ind. 482; *Sheets v. Andrews*, 2 Blkf. 274; *Hacker v. Blake*, 17 Ind. 97; *Burton v. Reeds*, 20 Ind. 87; *Wood v. Bibbins*, 58 Ind. 392; *Sebrell v. Hughes*, 72 Ind. 186; *Marsh v. Thompson*, 102 Ind. 272.

7. Notice to covenantor of suit brought. It is not necessary to the

sufficiency of the complaint that notice to the defendant of the bringing of the action under which the plaintiff was ejected should be alleged; but it is better to give such notice, as the judgment rendered will in that case establish the fact that plaintiff was evicted under a valid paramount title, and no other evidence of the fact is necessary in the action on the covenant. *Rhode v. Green*, 26 Ind. 83; *Blair v. Allen*, 55 Ind. 409; *Walton v. Cox*, 67 Ind. 164; *Morgan v. Muldoon*, 82 Ind. 347.

8. Statutory deed of warranty—What covenants contain. R. S. 1881, § 2927; ante, vol. 1, § 623; *McClure v. McClure*, 65 Ind. 482.

9. Where action must be brought. Ante, vol. 1, § 186.

10. Lease, continuing covenant, damages. *Block v. Ebner*, 54 Ind. 544.

11. When covenant in deed affects after-acquired title. *Locke v. White*, 89 Ind. 492; *Shumaker v. Johnson*, 35 Ind. 33; *Randall v. Lorner*, 92 Ind. 255.

SECTION XXXI.

CRIMINAL CONVERSATION.

190.—General form.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, and on divers other days since that day, the defendant wickedly debauched and carnally knew one —, who was then, and still is, the wife of the plaintiff, without the privity or consent of plaintiff.

By means whereof, the affection of said — has been alienated from plaintiff, and he has been deprived of the society and services of his said wife, and of her aid in his domestic affairs, and has suffered great distress of body and mind, and has been brought to great shame and dishonor, to his damage in the sum of — dollars, for which he demands judgment.

[*Signature.*]

1. Necessary allegations. *Hauck v. Grantham*, 22 Ind. 53; *Wales v. Minor*, 89 Ind. 118; *Lemmon v. Moore*, 94 Ind. 40.

2. Measure of damages. *Clouser v. Clapper*, 59 Ind. 548; *Harrison v. Price*, 22 Ind. 165; *Coleman v. White*, 43 Ind. 429; *Ferguson v. Smethers*, 70 Ind. 519.

3. Evidence. As to what evidence may be given by the defendant in bar and in mitigation of damages, see the following authorities: *McVey v. Blair*, 7 Ind. 590; *Underwood v. Linton*, 44 Ind. 72; *Underwood v. Linton*, 54 Ind. 468; *Harrison v. Price*, 22 Ind. 165; *Dallas v. Sellers*, 17 Ind. 479; *Van Vacter*

v. McKillip, 7 Blkf. 578; *Clouser v. Clapper*, 59 Ind. 548; *Ferguson v. Smithers*, 70 Ind. 519; *Michael v. Dunkel*, 84 Ind. 544; *Wales v. Minor*, 89 Ind. 118.

191.—For enticing away and adultery with wife.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, intending to defraud plaintiff of the affection and society of —, the wife of plaintiff, and while plaintiff and said — were living happily together as husband and wife, persuaded and enticed her to depart and leave the plaintiff, and said —, through the persuasion of defendant, was induced to, and did then and there, depart and leave the plaintiff without his consent and contrary to his desire.

That defendant, after enticing away plaintiff's wife, as above stated, admitted and received her and kept her at his, defendant's, house, and carnally knew her, by reason whereof, plaintiff lost the affection and services of his said wife, and has suffered great dishonor and mental shame and distress, to his damage — dollars, for which he demands judgment.

[*Signature.*]

1. Necessary allegations. See note 1 to Form 190, ante, p. 141.

192.—For enticing away and harboring plaintiff's wife.

[*Caption and commencement.*]

That — is, and was at the times hereinafter mentioned, the wife of the plaintiff, as defendant well knew.

That on the — day of —, 18—, while plaintiff and said — were living together happily as husband and wife, the defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of her comfort, society, and assistance, maliciously enticed her away from plaintiff's and her then residence in —, to a separate residence in —, and has ever since there detained and harbored her, against the consent of the plaintiff.

Whereby plaintiff has been, and still is, deprived by the defendant of the comfort, society, and aid of his said wife, and has suffered great distress of body and mind to his damage — dollars, for which he demands judgment.

[*Signature.*]

1. Necessary allegations. Where the action is for debauching the wife, it is not necessary to allege that defendant knew her to be the wife of plaintiff. *Wales v. Minor*, 89 Ind. 118.

But it is otherwise where the action is for enticing away or harboring the wife. The *intention* to deprive the plaintiff of her aid and society must be shown. *Hermance v. James*, 32 How. Pr. 142, and authorities cited.

Where the action is for enticing away and adultery there may be a recovery on proof of the enticing away alone, but not where the charge is for debauching the wife. *Higham v. Vanosdol*, 101 Ind. 160.

193.—For harboring wife.

[*Caption and commencement.*]

That on the — day of —, 18—, one —, who then was, and still is, the wife of plaintiff, unlawfully, and without plaintiff's consent, departed from the house and society of plaintiff.

That on the — day of —, 18—, and ever since, the defendant, well knowing the premises, wrongfully, and without plaintiff's consent, received, and harbored, and detained said —, and refused to deliver her to plaintiff, whereby plaintiff lost the society and services of his said wife, to his damage — dollars, for which he demands judgment.

[*Signature.*]

194.—Seduction of daughter and servant, and abduction.

[*Caption and commencement.*]

That at the times hereinafter mentioned one — was the daughter and servant of plaintiff.

That on the — day of —, 18— [and at divers times since], defendant, well knowing said — to be plaintiff's daughter and servant, and wrongfully intending to injure plaintiff, and deprive him of the services of said —, did willfully debauch and carnally know said — [or, forcibly and against the will of said —, and without the privity or consent of plaintiff, abduct her], [entice and persuade her to leave the residence and service of plaintiff, and to have illicit intercourse with him, the said defendant].

By reason whereof, said — became pregnant and sick with child, and so remained for — months, and during that time and now is unable to perform the necessary duties of her service, and plaintiff has been thereby deprived of her services, and was obliged to and did expend — dollars in nursing and taking care of said —, and in the delivery of said child, and the health and capacity of said — to perform said service was thereby permanently impaired, and plaintiff suffered great dishonor and distress of mind and wounded feelings, to his damage — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

1. Who may sue. R. S. 1881, §§ 263, 264; ante, vol. 1, §§ 82, 85. See SEDUCTION.

2. Measure of damages. Damages are not confined to mere loss of

service. The father may also recover for the dishonor occasioned and for wounded feelings. *Shattuck v. Myers*, 13 Ind. 46; *Pruitt v. Cox*, 21 Ind. 15; *Taylor v. Shelkett*, 66 Ind. 297; *Felkner v. Scarlet*, 29 Ind. 154.

And loss of service need not be shown. R. S. 1881, § 264; *Felkner v. Scarlet*, 29 Ind. 154.

But a recovery may be had for loss of services, although the seduction was occasioned as much by the misconduct of the daughter as by that of the defendant. *Bartlett v. Kochell*, 88 Ind. 425.

See SEDUCTION, p. 289.

SECTION XXXII.

DECEIT.

195.—Inducing sale of goods on credit.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, the defendant, in order to induce plaintiff to sell him [*or*, to sell one —] certain goods on credit, falsely and fraudulently, and with intent to deceive plaintiff, represented to him that he [*or*, said —] was solvent and worth — dollars.

That plaintiff, relying on said representations, was thereby induced to and did sell and deliver to defendant [*or*, to said —] goods of the value of — dollars, on a credit of — days.

That said representations were false and known to be so by defendant at the time.

That no part of the price of said goods has been paid, and defendant [*or*, said —] has no property subject to execution out of which the same can be made.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

196.—In quanti $\frac{1}{2}$ of land sold.

[*Caption and commencement.*]

That on the — day of —, 18—, in order to induce the plaintiff to buy of defendant a farm situated at —, for the price of — dollars, the defendant falsely and fraudulently represented, with intent to deceive plaintiff, that said farm contained — acres of land, and that [*state any other false representations*].

That plaintiff relied upon said representations and believed them to be true, and was thereby induced to and did buy said land and pay therefor said sum of — dollars.

That said representations were false, and said farm only contained — acres of land, as defendant at the time well knew.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

SECTION XXXIII.

DIVORCE AND ALIMONY.

197.—General form.

[*Caption and commencement.*]

That the plaintiff is now, and has been for more than two years last past, a *bona fide* resident of the State of Indiana, and for more than six months a *bona fide* resident of the county of —.

That the plaintiff and defendant were duly married on the — day of —, 18—, and lived together as husband and wife until the — day of —, 18—.

That on the — day of —, 18—, and at various other times thereafter, the defendant committed the crime of adultery with one —.

[*Or, was wholly impotent at the time of the marriage of plaintiff and defendant, and still continues to be so.*]

[*Or, has for the past — been guilty of cruel and inhuman treatment of the plaintiff, in this: (state the facts constituting the cruel and inhuman treatment.)*]

[*Or, on the — day of —, 18—, at —, defendant, without cause, wholly abandoned the plaintiff, and has lived apart from her (him), against her (his) wish and without her (his) consent.*]

[*Or, has been for — guilty of habitual drunkenness, and is now an habitual drunkard.*]

[*Or, if against the husband: has failed for more than two years (or, since the — day of —, 18—) to make reasonable, or any provision for the plaintiff, or their family, although fully able so to do.*]

[*Or, was, on the — day of —, 18—, by the judgment of the — Circuit Court, duly given and made, convicted of the crime of —.*]

That plaintiff and defendant have, as the fruits of their marriage, — children, whose names and ages are as follows: [*give names and ages of children.*]

That the defendant is not a fit person to have the care and custody of said children, and has, since the — day of —, 18—, left them to be cared for and supported by the plaintiff, who is a suitable person to have the care and custody of them.

That the defendant is the owner of real estate in the county of —, of the value of — dollars, and personal property of the value of — dollars, and the plaintiff has no property, real or personal.

That the plaintiff and defendant separated on the — day of —, 18—, and have not since lived or cohabited together.

Wherefore, plaintiff prays the court that the bonds of matrimony heretofore existing between the plaintiff and defendant be dissolved, and that plaintiff be granted a divorce, and that she [he] be given the care and custody of their said children, and that she have judgment for — dollars alimony and the sum of — dollars per annum for the maintenance of each of said children, to be paid as the court may direct, and for all other proper relief.

[*Signature.*]

[*Affidavit.*]

State of Indiana, — County.

—, being duly sworn, says he [she] is the plaintiff in the above entitled cause. That he [she] is now and has been for — years [*or*, since the — day of —, 18—] a *bona fide* resident of the State of Indiana, and for the two years last past has resided in the town [city], [township] of —, in the county of —, and that his [her] occupation is that of [*state occupation*].

[*Signature.*]

Subscribed and sworn to before me, the clerk of the — Circuit Court, this — day of —, 18—.

A. B., Clerk.

1. What complaint must contain. R. S. 1881, §§ 1031, 1032; *Fritz v. Fritz*, 23 Ind. 388; *Kenemer v. Kenemer*, 26 Ind. 330; *Burns v. Burns*, 60 Ind. 259; *Baker v. Baker*, 82 Ind. 146; ante, vol. 2, § 1385; *Murphy v. Murphy*, 95 Ind. 430.

2. What amounts to cruel treatment. *Shores v. Shores*, 23 Ind. 546; *Small v. Small*, 57 Ind. 568; *Graft v. Graft*, 76 Ind. 136; *Eastes v. Eastes*, 79 Ind. 363.

3. Separation must be alleged. There can be no divorce while the parties continue to cohabit. Therefore the complaint must allege a separation. Ante, vol. 2, § 1385; *Burns v. Burns*, 60 Ind. 259; *Ruby v. Ruby*, 29 Ind. 174.

4. Residence of plaintiff must be alleged. The fact that the plaintiff has resided within the state and county for the time required by the statute

is jurisdictional and must be alleged. R. S. 1881, § 1031; ante, vol. 2, § 1385; *Powell v. Powell*, 53 Ind. 513; *Maxwell v. Maxwell*, 53 Ind. 363; *Hood v. The State*, 56 Ind. 263.

But the fact that plaintiff becomes a non-resident after suit brought does not affect the jurisdiction. *Waltz v. Waltz*, 18 Ind. 449.

5. What will amount to an abandonment. *Stanbrough v. Stanbrough*, 60 Ind. 275.

6. Affidavit. As to what the affidavit required to be filed must contain, and before whom it must be verified, see R. S. 1881, § 1031; *Eastes v. Eastes*, 79 Ind. 363; ante, vol. 2, § 1385.

7. For what causes may be granted. R. S. 1881, § 1032; ante, vol. 2, § 1384; *Baker v. Baker*, 82 Ind. 146.

198.—To set aside voidable marriage.

[Caption and commencement.]

That plaintiff is now, and has been for more than two years last past, a *bona fide* resident of the State of Indiana, and for more than six months last past a *bona fide* resident of the county of —.

That on the — day of —, 18—, at —, she was married to the defendant.

That at the time of said marriage plaintiff was — years of age and incapable, from want of age, of contracting said marriage [or, was of unsound mind and incapable, from want of understanding, of contracting said marriage].

That on the — day of —, 18—, plaintiff separated from defendant, and they have not since cohabited or lived together as husband and wife.

Wherefore, plaintiff prays the court that said marriage be declared void.

[Signature.]

1. Voidable marriages may be declared void. R. S. 1881, § 1025; ante, vol. 2, § 1383.

SECTION XXXIV.

EJECTMENT.

199.—For possession, waste, and mesne profit

[*Caption and commencement.*]

That the plaintiff is the owner in fee-simple [*or, for the term of his life; or, is the equitable owner in fee-simple by title bond from —*], and entitled to the immediate possession of the following real estate in the county of —, State of Indiana [*here describe it*].

That defendant now holds possession of said real estate without right, and for — past has unlawfully kept plaintiff out of possession thereof, to his damage — dollars; has committed waste thereon by cutting timber, to plaintiff's damage — dollars, and the mesne profits of said property during the time defendant has had possession thereof have amounted to — dollars.

Wherefore, plaintiff demands judgment for the possession of said real estate and — dollars damages. [Signature.]

1. Title of plaintiff, how alleged. The Supreme Court has held that it is sufficient to allege in the complaint that plaintiff is "*the owner*" of the real estate in general terms. Ante, vol. 1, §§ 404, 405, 408, and cases cited.

But the statute clearly contemplates a more particular averment. R. S. 1881, § 1054.

And it is intimated, though not decided, in a later case, that while the complaint is not subject to demurrer, a motion to make it more specific should be sustained. *Schenck v. Kelley*, 88 Ind. 444.

It is safer, therefore, to state specifically the estate of the plaintiff in the property.

2. Description of the property. As to what will amount to a sufficient description of the property, see ante, vol. 1, §§ 386, 390, 391; *Brown v. Anderson*, 90 Ind. 93.

3. Measure of damages. Ante, vol. 2, § 1398.

4. Joinder of causes of action. Actions to recover possession, for damages for the detention, for mesne profits, and for waste or damage done to the land, may be joined. R. S. 1881, § 278; ante, vol. 1, §§ 311, 337.

SECTION XXXV.

ELECTION.

200.—For refusing plaintiff's vote.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, —, was inspector, and defendants, — and —, the judges of election at the general state [municipal], [special] election then held for the purpose of electing [*state what*], at the polls held in the — ward [*or, precinct*] in the city of —, in — township, county of —, State of Indiana, duly appointed and qualified.

That plaintiff was then a male citizen of the United States, over the age of twenty-one years, and did then, and had for the six months immediately preceding said election, resided in the State of Indiana and for sixty days in said — township, and for thirty days in said ward [precinct], and was legally entitled to vote at said election at said poll.

That as such elector, and while the polls were open, plaintiff duly offered to defendants his ballot for the election of said officers, and requested them to receive the same.

That defendants, disregarding their duty, wrongfully, maliciously, and corruptly refused to receive or deposit said ballot, and thereby deprived plaintiff of his right of suffrage at said election, to his damage — dollars, for which he demands judgment. [Signature.]

1. **The complaint must allege refusal to have been wrongful and malicious.** The question whether it is necessary to show that the refusal of the ballot was willful or malicious, or not, in order to render the election officers liable, is decided differently by different courts. But in this state such an allegation is held in an early case to be necessary. *Carter v. Harrison*, 5 Blkf. 138. And it is believed that the case cited is still the law of this state *Elmore v. Overton*, 104 Ind. 548, 552.

201.—Contest of election.

State of Indiana, — County.

Before the Board of County Commissioners of — County.

A. B. }
 v. } Contest of Election.
 C. D. }

A. B. complains of C. D. and states:

That on the — day of —, 18—, at a general election then held throughout the State of Indiana, for the election of [*state what*], the contestor and contestee were candidates in — county for the office of county auditor [*sheriff*], [*clerk*], they being the only candidates voted for for said office.

That the contestor was an elector of said county, and entitled to vote for the said C. D. for said office at said election.

That there were received and counted for the contestee, for said office, — votes, and for this contestor, for said office, — votes, and the said C. D. was declared duly elected to said office.

The contestor contests the election of said C. D. to said office on the following grounds:

1. There were cast in — township [— ward of the city of —], [*precinct*], in said county of —, for said C. D., for said office, — illegal votes, and the contestor received a majority in the county of all the legal votes cast for candidates for said office.

2. At — township, [— ward of the city of —], [*precinct*], in said county, there were — votes cast, — of which were cast for the contestor, and — for the contestee, for said office.

That of said votes cast for the contestor there were — taken from the ballot-box by —, the inspector of elections at said polls [*or, by some person to the contestor unknown*], and destroyed, which should have been and were not counted for him, and if said votes had been counted for him he would have had a majority of all the votes cast in said county for said office.

3. That the said — was, at the time of said election and still is, ineligible to said office, for the reason [*state the grounds upon which he is claimed to be ineligible*].

Wherefore, the contestor prays that the contestor be declared elected to and entitled to said office, and for all other proper relief.

[*Signature.*]

State of Indiana, — County.

A. B., being duly sworn, says he is the contestor in the above state-

ment, and that the facts therein stated are true in substance and in fact.

A. B.

Subscribed and sworn to before me, this — day of —, 18—.

D. E.,

Auditor of — County.

1. Necessary allegations. R. S. 1881, §§ 4744, 4747, 4758; *Wheat v. Ragsdale*, 27 Ind. 191; *Garrett v. Higgins*, 27 Ind. 162; *Nickols v. Ragsdale*, 28 Ind. 131; *Dobyns v. Weadon*, 50 Ind. 298; *Hadley v. Gutridge*, 58 Ind. 302.

2. When and with whom statement must be filed. If the contest is for a state office the statement must be delivered to the presiding officer of the house of representatives within twenty days after the first day of the next session of the general assembly. R. S. 1881, § 4747.

If the contest is for the office of senator or representative the statement must be filed with the clerk of the circuit court of the county in which the cause of contest originated, within ten days after the election. R. S. 1881, § 4747.

If the contest is for a county or township office the statement must be filed with the auditor of the county where the election therefor is held, and if for a district or county office, not otherwise provided for, with the auditor of the county giving the largest vote for such office, within ten days after the contestee has been declared elected. R. S. 1881, § 4758.

And it must affirmatively appear by the record to have been delivered or filed in time to give the proper court jurisdiction to act. *Farlow v. Hougham*, 87 Ind. 540.

3. By and before whom must be verified. The statement must be verified by the affidavit of the contestor. R. S. 1881, §§ 4744, 4747, 4758; *Holton v. Brown*, 46 Ind. 122.

And may be sworn to before the auditor. *Wheat v. Ragsdale*, 27 Ind. 191; *Curry v. Miller*, 42 Ind. 320.

But as the statute does not require the statement to be sworn to before any particular officer, it may be done before any officer competent to administer oaths.

4. Who may contest. The right to contest an election is not confined to the defeated candidate, but is given to any elector who was entitled to vote for the person whose election is contested, R. S. 1881, § 4743.

The right being given to a person having certain qualifications, the statement should show affirmatively that the contestor is so qualified.

5. Causes for contest. The causes for contest are specifically set out in the statute. R. S. 1881, § 4756.

But it is held that "the true *gravamen* of the case is to determine who received the highest number of legal votes." R. S. 1881, § 4757; *Dobyns v. Weadon*, 50 Ind. 298; *Gass v. The State*, 34 Ind. 425; *Allen v. Crow*, 48 Ind. 301.

This is not true, however, where one of the candidates is ineligible. In such case, although he may receive the highest number of legal votes, his opponent, who receives the next highest number, must be declared elected. *Gulick v. New*, 14 Ind. 93; *Carson v. McPhetridge*, 15 Ind. 327; *Price v. Baker*, 41 Ind. 572; *Jeffries v. Rowe*, 63 Ind. 592; *The State v. Johnson*, 100 Ind. 489.

SECTION XXXVI.

FALSE IMPRISONMENT.

202.—General form.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, defendant unlawfully imprisoned plaintiff, and deprived him of his liberty for the space of — hours [days],* to his damage — dollars, for which he demands judgment. [Signature.]

203.—Special damages.

[*Follow above form to *, and continue.*] Whereby plaintiff was prevented from attending to his business during said time, and incurred an expense of — dollars in costs and attorney's fees in obtaining a discharge [*allege any other special damages*].

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. Necessary allegations. False imprisonment differs from malicious prosecution, in that it is an imprisonment without process, and neither malice nor want of probable cause or that the act was wrongful or unlawful need be alleged. *Turpin v. Remy*, 3 Blkf. 210; *Colter v. Lower*, 35 Ind. 285; *Taylor v. Moffatt*, 2 Blkf. 305; *Hall v. Rogers*, 2 Blkf. 429; *Wasson v. Canfield*, 6 Blkf. 406; *Poult v. Slocum*, 3 Blkf. 421; *Gallimore v. Ammerman*, 39 Ind. 323; *Boaz v. Tate*, 43 Ind. 60; *Carey v. Sheets*, 60 Ind. 17; *Burt v. Pyle*, 89 Ind. 398; *Hildebrand v. McCrum*, 101 Ind. 61. See ASSAULT AND BATTERY, ante, p. 30.

FRAUD.

See ANSWER, p. 367; DESCENT, p. 144; FRAUDULENT CONVEYANCE, p. 153; REFORMATION, p. 276; RESCISSION AND CANCELLATION, p. 279.

SECTION XXXVII.

FRAUDULENT CONVEYANCE.

204.—By judgment creditor to set aside.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff recovered judgment in the — Circuit Court against the defendant, —, for the sum of — dollars and costs, amounting to the sum of — dollars, which judgment is in full force and wholly unpaid and unsatisfied.

That on the — day of —, 18—, said defendant was the owner in fee-simple of the following real estate in the county of —, State of Indiana [*describe it*], and on said day said defendant, for the purpose and with the intent to hinder, delay, and defraud his creditors, including plaintiff, conveyed said property, by warranty deed, to the defendant, —, for the colorable consideration of — dollars, but for no actual consideration whatever.

That defendant had not, at the time said conveyance was made, nor has he since had, nor has he now, sufficient other property subject to execution to pay his debts or any part thereof.

Wherefore, plaintiff prays that said deed be declared void and that said property be subjected to the payment of his said judgment.

[*Signature.*]

205.—To recover on note and set aside fraudulent conveyance.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars — days after date, with — per cent per annum interest.

That said note is now due and wholly unpaid.

That on the — day of —, 18—, said defendant was the owner in fee-simple [*or state his interest if not in fee-simple*] of the following real estate in — county, State of Indiana: [*describe it*].

That on said day, for the purpose and with the intent to cheat, hinder, and delay his creditors, including plaintiff, and to avoid the payment of said note, the said defendant conveyed said real estate to the

defendant, —, by deed, for a colorable consideration of — dollars, but for no actual consideration whatever.

That said defendant, —, had not, at the time of said conveyance, nor has he since had, nor has he now, sufficient other property subject to execution to pay his debts.

Wherefore, plaintiff demands judgment on-said note for — dollars, and prays that said deed be declared void as against creditors, and that said real estate be subjected to the payment of plaintiff's judgment herein. [Signature.]

[Copy of note.]

206.—By subsequent creditor for actual fraud of grantor and grantee.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, —, was largely indebted to various persons, in various sums, and was the owner of the following real estate in the county of —, State of Indiana, of the value of — dollars: [*describe it.*]

That on said day defendant and the defendant, —, entered into a conspiracy to cheat, hinder, delay, and defraud the creditors of said — and such as might subsequently become his creditors.

That, in pursuance of said conspiracy and in execution thereof, it was agreed between said parties that said — should, and he did, then convey to said —, for the fraudulent purpose aforesaid, the said real estate, for the consideration of — dollars, being less than half its real value and less than the amount then owing by said —, as — well knew.

That said — has since become, and now is, wholly insolvent, and at the time said conveyance was made he had not, nor has he since had, nor has he now, sufficient other property subject to execution to pay his debts or any part thereof.

That on the — day of —, 18—, the defendant, —, became indebted to plaintiff in the sum of — dollars for goods and merchandise sold him, a bill of particulars of which is filed herewith, and made a part of this complaint, which sum is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars, and prays that said conveyance be declared void as against the creditors of —, and that said real estate be subjected to the payment of plaintiff's claim. [Signature.]

[Bill of particulars.]

1. Necessary allegations. The complaint must show the deed to have been a fraud upon the plaintiff's rights, as a creditor, and a necessity of resorting to the property conveyed for the satisfaction of his debt. For this reason the complaint must allege that the defendant, who made the conveyance, had not sufficient property subject to execution to pay his debts, either at the time the deed was made or when the suit was brought: at the time the deed was made for the purpose of showing the fraud; at the time suit was brought for the purpose of showing a continuing necessity of resorting to the property. *Ante*, vol. 2, § 1150, p. 195.

And where two conveyances have been made, as in case of a conveyance by the debtor and wife to a third party, and by such party back to the wife, it is held that, in order to reach the property in the hands of the last grantee, it must be alleged that there was not other property at the date of the deed to him. *Spaulding v. Myers*, 64 Ind. 264.

The safer practice, therefore, is to make the allegation broad enough to cover the whole time from the making of the conveyance to the bringing of the action.

2. Debt must be due. It must be shown that the plaintiff's debt is due to entitle him to set aside the deed. *Collins v. Nelson*, 81 Ind. 75; *Evans v. Thornburg*, 77 Ind. 106.

3. When notice of the fraud, on the part of the grantee, must be alleged. If the grantee takes without consideration, notice of the fraud, on his part, need not be alleged. *Spaulding v. Blythe*, 73 Ind. 93; *Sherman v. Hogland*, 73 Ind. 472; *The Brookville Nat'l Bank v. Kimble*, 76 Ind. 195; *Anderson v. Etler*, 102 Ind. 115.

But it is otherwise where he pays a valuable consideration. R. S. 1881, § 4923; *Spaulding v. Blythe*, 73 Ind. 93; *Spaulding v. Myers*, 64 Ind. 264; *Evans v. Nealis*, 69 Ind. 148; *Brown v. Rawlings*, 72 Ind. 505; *McCormick v. Hyatt*, 33 Ind. 546; *Kyger v. The F. Hull Skirt Co.*, 34 Ind. 249; *Ball v. Barnett*, 39 Ind. 53.

And a subsequent grantee *with notice* takes a good title where the first grantee was an innocent purchaser. *Evans v. Nealis*, 69 Ind. 148.

4. Subsequent creditors, when may set aside deed. As to the right of subsequent creditors to set aside a fraudulent deed, see R. S. 1881, § 4920; *Dart v. Stewart*, 17 Ind. 221; *Pennington v. Clifton*, 11 Ind. 162; *Ruffing v. Tilton*, 12 Ind. 259; *Bishop v. Redman*, 83 Ind. 157; *Rogers v. Evans*, 3 Ind. 574; *Stevens v. Works*, 81 Ind. 445.

5. Who is a creditor. As to what will constitute the plaintiff a creditor, authorizing him to maintain the action, see *Wright v. Brandis*, 1 Ind. 336; *Shean v. Shay*, 42 Ind. 375; *Bishop v. Redmond*, 83 Ind. 157; *Stevens v. Works*, 81 Ind. 445.

6. Deceased grantor, necessary allegations.—When may sue heirs. Where the action is brought against an executor or administrator the plaintiff can not have the property sold for the payment of his debt alone. The rights of other creditors must be adjusted. The effect of the action, if successful, must be to make the real estate assets of the estate for the payment of all claims, and such should be the prayer of the complaint. *Carr v. Huette*, 73 Ind. 378; *Barton v. Bryant*, 2 Ind. 189.

The creditor can not maintain an action for his debt and to set aside the conveyance as against the heirs of the grantor, where there has been no adminis-

tration on the estate. The action, if maintainable at all, must be brought in behalf of all of the creditors to subject the land to administration. Ante, vol. 1, §§ 303, 423; The North-western Conference, etc., v. Myers, 36 Ind. 375; Barton v. Bryant, 2 Ind. 189; Wilson v. Davis, 37 Ind. 141; Leonard v. Blair, 59 Ind. 510; Carr v. Huette, 73 Ind. 378.

SECTION XXXVIII.

GUARANTY.

207.—Of payment for goods furnished another.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration that plaintiff would [*state as nearly as possible the promises of the guarantee, e. g.*] furnish one — with hardware from time to time, to an amount not exceeding the value of — dollars in all, notifying defendant, at the end of each month, of the amount sold, defendant, by his written agreement, a copy of which is filed herewith, and made a part of this complaint, guaranteed the payment of the price of the goods so sold for the space of — months.

That plaintiff, on the — day of —, 18—, notified defendant of his acceptance of said guaranty, and in consideration thereof sold and delivered to said —, during the — months following said date, hardware to the amount of — dollars, and duly notified defendant at the end of each month of the amount so sold.

That the said sum of — dollars is now due, and plaintiff demanded payment thereof from said — when due, but he has not paid the same, or any part thereof, of which plaintiff, on the — day of —, 18—, duly notified defendant, and demanded payment of him, which was refused, and said sum remains due and wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of guaranty.*]

[*Signature.*]

208.—Collectibility of note.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of the loan by plaintiff to one — of — dollars, secured by the promissory note of said —, due — days from said date, the defendant, by indorsement on the back of said note, copies of which note and indorsement

are filed herewith, and made parts of this complaint, guaranteed the collectibility thereof.

That on the — day of —, 18—, said note became due and said — made default in the payment of the principal and interest thereof.

That on the — day of —, 18—, plaintiff commenced an action against said — on said note, in the — Circuit Court of the State of Indiana, and on the — day of —, 18—, judgment was rendered in his favor in the sum of — dollars, on which execution was duly issued on the — day of —, 18—, but returned wholly unsatisfied, of all which the defendant was, on the — day of —, 18—, duly notified, and payment demanded from him [*or, instead of the allegation of judgment and execution unsatisfied, say: Said — was, at the maturity of said note, and has ever since remained, wholly and notoriously insolvent, and is not possessed of any property out of which any part of said debt can be made.*].

That on the — day of —, 18—, plaintiff duly demanded payment from the defendant of the amount due on said note, but he has not paid the same, or any part of it, and the whole thereof is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of note and guaranty.*]

[*Signature.*]

209.—Of payment of rent.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration that plaintiff would let to — [*describe the property*], at — dollars per month, payable on the last day of each month, defendant guaranteed by indorsement on the lease, a copy of which guaranty is filed herewith, and made a part of this complaint, the payment of said installments of rent, and on said day plaintiff let said property to said — on said terms.

That said — did not pay the installments of said rent payable on the — day of —, 18—, and on the — day of —, 18—, or any part thereof, and said — is indebted to plaintiff therefor in the sum of — dollars, of which defendant, on the — day of —, 18—, had notice, and was then requested to pay the same, but refused.

That said sum of — dollars and interest is now due and wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of guaranty.*]

[*Signature.*]

210.—To pay deficiency after foreclosure.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of the loan by plaintiff to one — of — dollars, secured by the note and mortgage of said — [*or state any other consideration*], defendant, by his written agreement, a copy of which is filed herewith, and made part of this complaint, guaranteed and promised plaintiff to pay to him any deficiency in said debt not realized from said note and mortgage, in case of foreclosure, which guarantee plaintiff accepted at the time and so notified defendant.

That said debt became due and payable on the — day of —, 18—, and said — made default in the payment thereof, and thereupon plaintiff brought action on said note and mortgage in the — Circuit Court of the State of Indiana, and such proceedings were had therein that on the — day of —, 18—, judgment was rendered in favor of plaintiff on said note for — dollars, and the sale of the mortgaged property decreed for the satisfaction thereof.

That an execution and order of sale were duly issued under said decree, and on the — day of —, 18—, said premises were duly sold thereunder, by the sheriff of said county, for the sum of — dollars, to one —.

That after said sale there was a balance due plaintiff of — dollars, and said execution was returned on the — day of —, 18—, “no property found on which to levy.”

That no part of said balance has been paid, and said — is now, and has been ever since said note matured, wholly and notoriously insolvent.

That on the — day of —, 18—, plaintiff notified defendant of said deficiency, the amount still due, and the non-payment thereof by said —, and demanded payment thereof, which was refused.

That said sum of — dollars and interest thereon is now due and wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of guaranty.*]

[*Signature.*]

211.—Of performance of contract.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of a contract then made between plaintiff and —, a copy of which is filed herewith, and made a part of this complaint, the defendant, by his agreement indorsed thereon, a copy of which is filed herewith, and made a

part of this complaint, guaranteed the faithful performance of said contract by said —, which guaranty was at the time accepted by the plaintiff, and defendant so notified.

That plaintiff has fully performed all of the conditions of said contract on his part to be performed, but the said — has wholly failed to perform his part thereof, to plaintiff's damage — dollars.

That on the — day of —, 18—, defendant was notified by plaintiff of the failure of said — to comply with said contract, and that plaintiff had suffered damage thereby in the sum of — dollars, and payment thereof was demanded from defendant and refused.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of contract and guaranty.*]

[*Signature.*]

212.—By guarantor to recover from principal money paid on guaranty.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, by an agreement in writing, rented from one — a certain dwelling-house in — for the term of — years, and agreed to pay said —, as rent therefor, — dollars per annum, payable — dollars on the first day of each and every month.

That, at defendant's request, plaintiff, by his written indorsement on said agreement, guaranteed to said — the faithful performance by defendant of all the terms of said agreement.

That defendant failed to pay the installments of rent due on the — day of —, 18—, and the — day of —, 18—, by reason whereof plaintiff was compelled to pay, and did, on the — day of —, 18—, pay the same to said —.

That said sum and the interest thereon is now due to plaintiff, and remains wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

1. Principal and guarantor can not be sued jointly. Ante, vol. 1, § 127.

2. What amounts to a guaranty. *Sample v. Martin*, 46 Ind. 226; *Smith v. Bainbridge*, 6 Blkf. 12; *Gaff v. Sims*, 45 Ind. 262; *Virden v. Ellsworth*, 15 Ind. 144; *Anderson v. Spence*, 72 Ind. 315; *Studebaker v. Cody*, 54 Ind. 586; *Burnham v. Gallentine*, 11 Ind. 295; *Watson v. Beabout*, 18 Ind. 281; *Leonard v. Shirts*, 33 Ind. 214; *Dickinson v. Colter*, 45 Ind. 445; *Billingsby v. Dempe-wolf*, 11 Ind. 414; *Wills v. Ross*, 77 Ind. 1; *McCurdy v. Bowes*, 88 Ind. 583; *La Rose v. The Logansport, etc., Nat'l Bank*, 102 Ind. 332.

3. Want of diligence to make debt out of principal. There is a material difference between a guaranty and a surety as to the effect of the neglect of the creditor to sue or use diligence against the principal. A guarantor

is not released by the failure to use such diligence, nor can he require the creditor, by notice, to sue the principal. *Sample v. Martin*, 46 Ind. 226.

But the defendant may show any damage resulting to him from the failure to use proper diligence. *Smith v. Bainbridge*, 6 Blkf. 12.

4. Notice of acceptance and default of principal. Where the guaranty is direct and for a definite amount, known to the guarantor at the time, notice of acceptance or default of principal is not necessary. It is otherwise where the debt guaranteed is yet to be created, is uncertain, and the amount can not be known to the guarantor at the time of the guaranty. *Smith v. Bainbridge*, 6 Blkf. 12; *Gaff v. Sims*, 45 Ind. 262; *Studebaker v. Cody*, 54 Ind. 586; *Leonard v. Shirts*, 33 Ind. 214; *Milroy v. Quinn*, 69 Ind. 406; *Taylor v. Taylor*, 64 Ind. 356; *Frash v. Polk*, 67 Ind. 55; *Kline v. Raymond*, 70 Ind. 271; *Wills v. Ross*, 77 Ind. 1.

But it is held in a late case that a failure to allege notice of default does not vitiate the complaint, as damages must result as a consequence to discharge the guarantor, and this is matter of defense, except in case of commercial paper. *Ward v. Wilson*, 100 Ind. 52; *La Rose v. The Logansport Nat'l Bank*, 102 Ind. 332.

This case is proof sufficient of the uncertainty of all rules laid down with reference to notice. The Supreme Court has stated these rules in so many different ways, and the decisions are in such a state of confusion upon the point, that the only safe way is to *allege notice in every case*. The effect of the last case cited is to establish the rule that notice of the default of the principal is necessary in every case of guaranty, as the cases given where notice is not necessary are not cases of guaranty at all, but original promises to pay the debt "absolutely and at all events."

5. Is within the statute of frauds. A guaranty is a promise to answer for the debt of another and within the statute of frauds. Therefore, under the rule of pleading in this state, the complaint must show the promise to be in writing, or it will be bad on demurrer. Ante, vol. 1, § 421; *Anderson v. Spence*, 72 Ind. 315; *Wills v. Ross*, 77 Ind. 1.

As to what will amount to a sufficient writing to take the contract out of the statute, see *Wills v. Ross*, 77 Ind. 1.

Where the party, the performance of whose act is guaranteed, is not bound by the contract by reason of disability, or the like, the verbal promise of the guarantor for its payment is not within the statute, as he is the only person bound. *King v. Summitt*, 73 Ind. 312.

SECTION XXXIX.

HABEAS CORPUS.

213.—Petition by party confined.

State of Indiana, ——— County.

In the ——— Circuit Court, ——— Term, 18—.

A. B. }
 v. }
 C. D. } Habeas Corpus.

Your petitioner, ———, respectfully represents that he is unlawfully restrained of his liberty [imprisoned] by ——— [*if an officer, state his official character*], at ——— [*state the place where*]. The pretended cause of restraint [imprisonment] is as follows: [*state it.*]

That the restraint [imprisonment] is illegal, in this: [*state the ground relied upon, e. g.*], the commitment under which your petitioner was received and imprisoned by said ——— was issued by ———, a justice of the peace of ——— township, ——— county, Indiana, without any judgment of conviction or other judgment or order authorizing such commitment.

Wherefore, your petitioner asks that a writ of habeas corpus may be granted, and that he may be discharged from such unlawful restraint [imprisonment].

[Signature.]

[Verification.]

214.—By a guardian for his ward.

[Caption and commencement.]

Your petitioner respectfully represents that he is the duly appointed guardian of ———, as shown by his letters of guardianship, filed herewith, and made a part of this petition.

That said ——— is restrained of his liberty by ——— at ———.

The cause of said restraint is as follows: [*state it.*]

That said restraint is wrongful and illegal, for the reason [*state it.*]

Wherefore, your petitioner asks that a writ of habeas corpus may be granted; and that said ——— may be discharged from such unlawful restraint.

[Signature.]

[Verification.]

[Copy of letters of guardianship.]

215.—By prisoner to be let to bail.

[*Venue, court, and term.*]

In the matter of the }
 petition of ——— } Petition to be let to bail.

Your petitioner respectfully represents that he is confined in the county jail of ——— county, State of Indiana, by ———, the sheriff of said county, under a charge of murder in the first degree, an indictment having been returned against him by the grand jury of said county, at the ——— term of the ——— Circuit Court, charging that [*or, having been committed by ———, a justice of the peace of ——— township, of ———, in said county, without bail, on the charge that*] he did, on the ——— day of ———, 18—, at the county of ———, State of Indiana, feloniously, purposely, and with premeditated malice, unlawfully kill and murder one ———.

That he is not guilty of said crime or any other crime not bailable, and the proof against him of the crime for which he is imprisoned is not evident nor the presumption of his guilt strong.

Wherefore, he prays that a writ of habeas corpus be granted and that he be admitted to bail.

[*Signature.*][*Verification.*]

1. Grounds of granting writ and discharge of petitioner. R. S. 1881, §§ 1108, 1121; ante, vol. 2, §§ 1420, 1425; *Privett v. Pressly*, 62 Ind. 491; *Madden v. Emmens*, 83 Ind. 331; *Farmer v. Lewis*, 92 Ind. 444; *Sturgeon v. Gray*, 96 Ind. 166; *Milligan v. The State*, 97 Ind. 355; *Lumm v. The State*, 3 Ind. 293.

2. Who may have writ. R. S. 1881, §§ 1106, 1107, 1121; ante, vol. 2, § 1418.

3. To let to bail—Necessary allegations. *Ex parte Heffren*, 27 Ind. 87; *Ex parte Jones*, 55 Ind. 176; *Ex parte Sutherland*, 56 Ind. 595; *Ex parte Walton*, 79 Ind. 600; *Ex parte Kendall*, 100 Ind. 599.

4. For the custody of infants—Necessary allegations. *Warren v. Hofer*, 13 Ind. 167; *Gregg v. Wynn*, 22 Ind. 373; *Milligan v. The State*, 86 Ind. 553; *McGlennan v. Margowski*, 90 Ind. 150; *Joab v. Sheets*, 99 Ind. 328.

SECTION XL.

HUSBAND AND WIFE.

216.—Against husband for necessities furnished wife.

[Caption and commencement.]

That on the — day of —, 18—, and on succeeding days until the — day of —, 18—, plaintiff furnished to —, the wife of defendant, at her request, sundry articles to wit: [state what] [or say, a bill of particulars of which is filed herewith, and made a part of this complaint] of the value of — dollars.

That the same were necessary for her maintenance, and suitable to her station in life.

That on the — day of —, 18—, plaintiff demanded payment thereof from defendant, which was refused.

That the same is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Bill of particulars.]

[Signature.]

1. When husband liable for necessities furnished wife. *Vanuxen v. Rose*, 7 Ind. 222; *Litson v. Brown*, 26 Ind. 489; *Wallace v. Ellis*, 42 Ind. 582; *Oinson v. Heritage*, 45 Ind. 73; *Orr v. Miller*, 98 Ind. 436.

217.—By wife against husband and others for support of herself and children.

[Caption and commencement.]

That plaintiff and defendant, —, were duly married on the — day of —, 18—, and lived together as husband and wife until the — day of —, 18—, when he deserted the plaintiff, and their children hereinafter named, without cause, leaving them no provision for their support, and has not since that time contributed to or made any provision for their maintenance [or state any of the other grounds for the action stated in § 5132, R. S. 1881].

That they have, as the fruits of their said marriage, — children, whose names and ages are as follows: [state their names and ages] who are now and have been, since the — day of —, 18—, living with and supported by the plaintiff.

That the defendant, —, is the owner of the following real estate, in the county of —, State of Indiana [describe it], of the value of

— dollars, and of the rental value of — dollars per annum. Also a promissory note given by the defendants, — and —, to him for — dollars, payable — months after date, on which there is now due and unpaid, — dollars. Also the following personal property [*describe it*] of the probable value of — dollars.

That said property is wholly unincumbered, and the said defendant, —, is a farmer, and amply able financially to maintain plaintiff and said children.

That the plaintiff lived with said defendant until his desertion of her, as above stated, and has since lived with her said children at —.

That she has no property or means of her own, and has been compelled, since said — day of —, 18—, to support herself and children wholly by her own labor.

That the amount necessary for the support of plaintiff and said children is — dollars per annum.

Wherefore, plaintiff prays the court for an order authorizing her to rent said real estate, and sell said personal property, and to collect the rents and purchase-money therefor, and make all necessary contracts for said purpose, and to sue for, collect, and receipt therefor, and to sue for, collect, and receipt for the amount due on the said note of defendants, — and —, and for all other proper relief.

[*Signature.*]

1. Necessary allegations. R. S. 1881, §§ 5132, 5133; *Stanbrough v. Stanbrough*, 60 Ind. 275. See also *Rooker v. Rooker*, 60 Ind. 550; *Harris v. Harris*, 101 Ind. 498.

SECTION XLI.

INDEMNITY.

218.—For accepting bill for defendant's accommodation.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant mutually agreed that plaintiff would accept for defendant's accommodation a certain bill of exchange, dated —, drawn by defendant on plaintiff, payable in — months from date, to the order of defendant, in the sum of — dollars, and to deliver the same to defendant, to be negotiated by him for his own benefit, in consideration whereof, defendant promised to hold plaintiff harmless from any loss or damage by reason of said acceptance.

That accordingly, on said day, plaintiff accepted said bill and delivered the same to defendant for his accommodation, and defendant negotiated the same.

That on the — day of —, 18—, plaintiff, as such acceptor, was called upon and obliged to pay and did pay to one —, the holder thereof, the amount of said bill specified, with interest and the costs of a certain action before then brought in the — Circuit Court on said bill, by said holder, against the plaintiff, and plaintiff was obliged to and did pay — dollars costs in defending said action. Whereby, he has been damaged to the amount of said sums, being — dollars, no part of which has been paid, and which is now due.

Wherefore, he demands judgment for — dollars. [*Signature.*]

219. For defending action for money of another paid by plaintiff to defendant.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, having — dollars belonging to one —, at defendant's request, delivered the same to defendant, who claimed it, and not knowing to whom it belonged.

That the said — then threatened to bring an action against plaintiff for said money; and thereupon, on the — day of —, 18—, plaintiff, at defendant's request, agreed with defendant to defend said action of — for said money, in consideration whereof, defendant promised to save plaintiff harmless from the consequences of said action.

That afterwards, said — prosecuted an action against plaintiff for said money in the — Circuit Court, of which defendant had notice, and plaintiff, with the privity of the defendant, and in compliance with his said agreement, defended said action, to the best of his ability, but said —, by the consideration of said court, on the — day of —, 18—, recovered a judgment against the plaintiff, in said action, for — dollars, and — dollars costs, which plaintiff was compelled to and did pay, and plaintiff was put to the further expense of — dollars in defending said action.

That said sums amounting to — dollars are now due from defendant to plaintiff, and unpaid.

Wherefore, he demands judgment for — dollars. [*Signature.*]

For other forms of complaints under indemnifying contracts, see INDEMNIFYING BONDS, 71; SHERIFFS, p. 290; PARTNERSHIP, p. 261; INDEMNIFYING MORTGAGES, 233.

2. Infant not liable for costs. *Holmes v. Atkins*, 2 Ind. 398.

3. Consent of next friend—Liability for costs. The statute requires that where an infant is a sole plaintiff, a next friend must file his consent to act as such, and to be responsible for costs, before summons shall issue. R. S. 1881, § 256; ante, vol. 1, § 79; *Welch v. Bunce*, 83 Ind. 382.

4. Failure to allege infancy of plaintiff is not cause for demurrer. *Lancaster v. Gould*, 46 Ind. 397; *Funk v. Davis*, 103 Ind. 281.

Ratification by. See REPLY, p. 412.

Disaffirmance by. See ANSWER, p. 399.

Defense of infancy. See ANSWER, p. 371.

INFORMATION.

See QUO WARRANTO, p. 268.

SECTION XLIII.

INJUNCTION.

223.—Retiring partner's agreement not to compete.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant executed articles of copartnership and entered into partnership as [*state what*], at [*state where*].

That on the — day of —, 18—, said partnership was dissolved by mutual consent, the plaintiff buying defendant's interest in said business and all the stock in trade and good-will thereof, and defendant, in consideration of said purchase, agreeing with plaintiff not to carry on business in the same city in competition with plaintiff.

That plaintiff has duly performed all the conditions of said contract on his part to be performed.

That plaintiff is engaged in continuing said business at the same place, but defendant, in violation of said agreement, has opened a store and is carrying on the business of — therein, on — street, in said city, within — squares of plaintiff's store, and in competition therewith, and threatens to and will, unless restrained by this court, continue to carry on the same.

That said acts of defendant in violation of said agreement are a continuing injury and interference with plaintiff's business, and prevents its establishment and greatly reduces plaintiff's profits, and can not be fully compensated in damages.

Wherefore, plaintiff asks that defendant be enjoined from carrying on said business in said city and for all other proper relief.

[*Signature.*]

1. When will be granted in this class of cases. Thayer *v.* Young, 86 Ind. 259; Wells *v.* Rhodius, 87 Ind. 1; Beard *v.* Dennis, 6 Ind. 200; Baker *v.* Pottmeyer, 75 Ind. 451.

224.—Piracy of trade-mark and damages.

[*Caption and commencement.*]

That plaintiff is, and has been, ever since the year —, the manufacturer of an article [commodity] [*describe it*] known as —, which he has sold in packages [bottles], labeled with the following device and trade-mark, adopted and used by plaintiff ever since the year —: [*copy the trade mark.*]

That said article [commodity] has acquired a great reputation by reason of its excellence, and has been, and is, the source of great profit to plaintiff, and is known to the public and to buyers by said device and trade-mark.

That defendant, well knowing the plaintiff's rights, has for the past — months, in disregard thereof, made and offered for sale, and sold, and is still offering for sale and selling, a similar article [commodity], [imitation of plaintiff's article], which he has put up and sells in packages [bottles] similar to plaintiff's, and has labeled the same with plaintiff's said trade-mark [*or*, with a label and trade-mark similar to that of plaintiff, of which the following is a copy: [*copy*)].

That said trade-mark [*or*, imitation] is calculated to deceive, and does deceive, buyers of plaintiff's article and the public, and has induced many persons to purchase defendant's article, in the belief that it was made by the plaintiff, thereby diminishing plaintiff's profits.

That said article sold by defendant is greatly inferior to that of plaintiff's, whereby the reputation of plaintiff's article has been greatly injured.

That, by reason of said wrongful acts of defendant, plaintiff has sustained — dollars damages.

That defendant is about to, and will, unless restrained by this court, continue to infringe on plaintiff's rights as aforesaid.

Wherefore, plaintiff demands judgment for — dollars, and prays that a temporary injunction may issue, restraining defendant from the further manufacture and sale of said article with an imitation of plaintiff's packages and trade-mark, and that, on final hearing, a perpetual injunction against the same be granted.

[*Signature.*]

[*Verification.*]

1. When temporary injunction may be granted. *Miller v. Shriner*, 86 Ind. 493.

225.—Against trespass.

[*Caption and commencement.*]

That plaintiff is the owner in fee-simple, and entitled to the immediate possession and use of the following real estate in the county of —, State of Indiana: [*describe it.*]

That he has growing on said real estate about — acres of walnut timber, being the only timbered land on said real estate, which is used for farming purposes, the same being reserved by plaintiff for the timber, the trees thereon being young and growing trees.

That the defendant, on the — day of —, 18—, wrongfully, and without the license or consent of plaintiff, entered upon said real estate, and has cut down about — of said trees, and is threatening to and will, if not restrained by this court, cut down and remove all of said growing timber.

That the destruction of said trees would greatly and permanently injure said real estate, and plaintiff could not be compensated therefor in damages.

That plaintiff can not give notice of the hearing of his application for a restraining order, for the reason that before the notice required could be given defendant would have all of said timber cut down and removed.

Wherefore, plaintiff asks that an order be granted restraining defendant from cutting any of said timber until notice of the hearing can be given, and that upon such hearing a temporary injunction may be granted until the final hearing, and that upon the final hearing the defendant be perpetually enjoined from cutting said timber or any part of it.

[*Signature.*]

[*Verification.*]

1. When injunction will lie in trespass. *Ante*, vol. 2, § 1436; *Thatcher v. Humble*, 67 Ind. 444; *Anthony v. Sturges*, 86 Ind. 479.

2. Restraining order, when will issue. *R. S.* 1881, § 1150; *ante*, vol. 2, § 1438; *The College, etc., Gravel R. Co. v. Moss*, 77 Ind. 139.

See TRESPASS, p. 300.

226.—Against nuisance.

[*Caption and commencement.*]

That plaintiff is, and has been since the — day of —, 18—, the owner in fee-simple of a dwelling-house known as No. —, in the city of — [or, situate on the corner of A and B streets in the town of —], and has ever since resided therein with his family.

That on the — day of —, 18—, the defendant erected a slaughter-house on the lot adjoining plaintiff, and causes cattle, sheep, and other animals to be slaughtered there.

That a great stench arises from the blood and offal from the animals so slaughtered, and a great noise from the cries of said animals is constantly going on at all times of the day and night.

That said stench is so offensive, and so injurious to the health of plaintiff and his family, that plaintiff is deprived of the enjoyment of his said property, and the same is rendered thereby, and by said noises, uninhabitable, and greatly depreciated in value.

Wherefore, plaintiff prays for a temporary injunction, restraining defendant from carrying on said business until the final hearing of this case, and that upon the final hearing said injunction be made perpetual, and for all other proper relief.

[Signature.]

[Verification.]

1. **When injunction will lie for nuisance.** Ante, vol. 2, § 1436; *Heiser v. Lovett*, 85 Ind. 240; *Reichert v. Geers*, 98 Ind. 73.

See NUISANCE, p. 252.

227.—Against transfer of note.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff executed to defendant his promissory note, in the words and figures following: [*copy note, or describe it, if can not give copy.*]

That the consideration for said note was the conveyance by defendant to plaintiff of a certain tract of — acres of land in the county of —, State of —, described as follows: [*describe*] which was on said day conveyed by defendant to plaintiff, by deed duly executed, wherein defendant covenanted with plaintiff that said property was clear and free of all incumbrances.

That said property was not free from all incumbrances, but was then incumbered by a mortgage made by — to —, on the — day of —, 18—, for — dollars, with interest from —, at — per cent per annum, which is still in full force and uncanceled of record, and wholly unpaid.

That defendant threatens to and will, if not restrained by this court, transfer said note so made by plaintiff to an innocent buyer for value, in order to prevent plaintiff from making a defense to the same.

Wherefore, plaintiff asks that defendant be enjoined from negotiating, indorsing, assigning, or in any way transferring said note [*or, any interest therein to the amount of said incumbrance*], and that on final

hearing, said note may be ordered to be delivered up and canceled, and for all other proper relief.

[*Signature.*]

[*Verification.*]

1. Complaint for, when must be verified. If the complaint seeks for a restraining order or temporary injunction, it must be verified; if for a perpetual injunction at the final hearing, only, it is not necessary. Ante, vol. 1, § 430; vol. 2, § 1437.

2. In what cases an injunction will be granted. Ante, vol. 2, § 1436.

3. Who may grant. Ante, vol. 2, § 1435.

SECTION XLIV.

INNKEEPER.

228.—By guest against innkeeper for loss by theft.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant was an innkeeper, and kept a common inn at —, known as the — House, and on said day, as such innkeeper, received plaintiff as his guest, with a trunk containing [*describe contents lost*], the property of plaintiff.

That while plaintiff was such guest, said trunk, while in defendant's inn, was broken open and said articles stolen by some person to plaintiff unknown, whereby the same were lost, to the damage of plaintiff — dollars, which sum is due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

229.—Refusal to receive and lodge.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant was the keeper of a common inn at —, known as the —, for the accommodation of travelers.

That the plaintiff, then being a traveler, came to said inn and required the defendant to receive and lodge him as a guest during the night next ensuing.

That plaintiff was ready and willing and offered to pay defendant his reasonable charges for such lodging.

That defendant had sufficient room and accommodation to receive and lodge plaintiff during said time, but refused to receive him or per-

mit him to lodge at said inn, whereby, plaintiff was obliged to travel — miles, in order to procure a lodging elsewhere, and was put to inconvenience and expense [*allege any special damages*], to his damage — dollars, for which he demands judgment. [Signature.]

230.—By innkeeper for board and lodging.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff received defendant, at his request, as boarder and lodger, and continued to board and lodge him until the — day of —, 18—, for which defendant agreed to pay plaintiff — dollars per week [*or, which boarding and lodging was reasonably worth — dollars per week*].

That there is now due plaintiff therefor and unpaid — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

1. Necessary allegations in actions against innkeepers. In order to recover against an innkeeper on his common law liability, it must be alleged that he was an innkeeper, and that plaintiff was his guest. *Hill v. Owen*, 5 Blkf. 323; *Thickstein v. Howard*, 8 Blkf. 535; *Laird v. Eichold*, 10 Ind. 212.

Negligence need not be alleged. It will be presumed. *Laird v. Eichold*, 10 Ind. 212; *Huntington v. Drake*, 24 Ind. 347; *Baker v. Dessauer*, 49 Ind. 28.

That the loss did not happen through any neglect or fault of defendant is matter of defense. *Baker v. Dessauer*, 49 Ind. 28.

INSANE.

See *WILLS*, p. 318; *ANSWER*, p. 399.

SECTION XLV

INSURANCE.

FIRE INSURANCE.

231.—By insured on a fire policy—Renewal.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff, being the owner [mortgagee to the amount of — dollars] of a house, and furniture therein, on — street, in the city of —, in consideration of the premium of — dollars paid, defendant, by their [its] policy of in-

surance, a copy of which is filed herewith, and made a part of this complaint, insured plaintiff against loss or damage by fire to the amount of — dollars on said house, and — dollars on said furniture therein, from the — day of —, 18—, at 12 o'clock, noon, to the — day of —, 18—, at 12 o'clock, noon.

[If renewed, say: That on the — day of —, 18—, in consideration of the premium of — dollars paid, the defendant executed and delivered to plaintiff a renewal receipt, a copy of which is filed herewith, and made part of this complaint, whereby they (it) renewed said insurance from said — day of —, 18—, to the — day of —, 18—, at 12 o'clock noon.]*

That plaintiff has duly performed all of the conditions on his part to be performed; and, on the — day of —, 18—, said house and furniture were totally destroyed by fire [or, damaged by fire, the house to the amount of — dollars, and the furniture therein to the amount of — dollars].

That plaintiff immediately thereafter, on the — day of —, 18—, notified defendant of said loss, and on the — day of —, 18—, and more than — days prior to this action, gave defendant due proofs of said loss.

That said house and furniture were owned by plaintiff at the time the same were destroyed [damaged], and the house was of the value of — dollars, and the furniture of the value of — dollars.

That no part of said loss has been paid, and the same is now due.

Wherefore, plaintiff demands judgment for — dollars.

[Copy of policy and renewal receipt.]

[Signature.]

232.—Loss payable to mortgagee.

[Follow preceding form to *, substituting name of original insured for the word plaintiff.]

That on the — day of —, 18—, the insured duly executed to plaintiff his mortgage on said house and premises, to secure the sum of — dollars, and assigned said policy to plaintiff, by indorsement thereon; and thereupon defendant, at the request of plaintiff and said insured, indorsed on said policy, "loss, if any, payable to — [plaintiff] as his interest may appear."

That said mortgage and the debt thereby secured are wholly unpaid and unsatisfied, and there is now due to plaintiff, and unpaid thereon, — dollars, and interest from the — day of —, 18—, at — per cent per annum.

[Continue as in form above from *, except aver performance of conditions and notice and proofs of loss by the original insured.]

233.—By assignee of the policy who bought the property.

[*Substitute for the above.*]

That on the — day of —, 18—, said — [*original insured*] duly sold and conveyed said property to the plaintiff, and duly assigned said policy of insurance to him by indorsement thereon, and then and there notified defendant of said sale and assignment, and defendant thereupon indorsed its consent thereto on the policy.

[*Continue as in Form 228 from *, averring notice and proofs of loss by plaintiff, and not by original insured, and that plaintiff was owner at time of loss.*]

234.—Averring waiver of a condition.

That on the — day of —, 18—, the defendant waived the condition required by the policy that [*state what the condition was*], and released plaintiff from the performance thereof by [*state how it was released, e. g., by indorsement, by agreement, by acts of estoppel, setting out the facts*].

235.—Agreement to insure and to give policy

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff applied to defendant for insurance against loss or damage by fire on — [*state what*], the property of plaintiff, and defendants, in consideration of a premium of — dollars, to be paid them by plaintiff, agreed to insure plaintiff from twelve o'clock noon of said day on said property for the space of — months, and to execute and deliver to plaintiff, within a reasonable and convenient time, their policy of insurance therefor in the usual form of policy issued by them.

The usual form of policy of defendant's agrees [*state its legal effect, e. g.*] to make good to the assured all such loss or damage as shall happen to the property insured by fire, not exceeding the amount insured, estimated according to the actual cash value thereof, the same to be paid within sixty days after proofs of loss are furnished. And the assured is required, immediately after a loss, to notify the company thereof, and as soon thereafter as possible to deliver an itemized account of loss in writing, signed and sworn to, stating also what other insurance was made on said property, what was the origin of the fire [*etc.*]

That afterward, on the — day of —, 18—, said property, which was then the property of plaintiff, and of the value of — dollars, was destroyed [*damaged*] by fire, whereby plaintiff sustained a loss to the amount of — dollars.

✕ This proof of loss not required, when the Company denies liability for the loss on the ground of no policy, or fraud.
Campbell vs. American Ins. Co., 110 Ind. 465, certiorari 110 Ind. 497

That defendant neglected and refused, and still refuses, to execute its said policy of insurance in writing to plaintiff, pursuant to said agreement.

That plaintiff has duly performed all the conditions of said contract on his part to be performed, and on the — day of —, 18—, notified said company of said loss, and on the — day of —, 18—, duly furnished defendant with proofs of loss.

That said sum of — dollars is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

1. Necessary averments. (a.) *Policy must be set out.* The Peoria, etc., Ins. Co. v. Walser, 22 Ind. 73; Indiana Ins. Co. v. Hartwell, 100 Ind. 566.

(b.) *Must show plaintiff had insurable interest in property at time of insurance and time of loss.* The Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; The Aurora, etc., Ins. Co. v. Johnson, 46 Ind. 315; Bersch v. The Sinissippi Ins. Co., 28 Ind. 64; American Ins. Co. v. Leonard, 80 Ind. 272; The Aetna Ins. Co. v. Kittles, 81 Ind. 96; Phoenix Ins. Co. v. Benton, 87 Ind. 132; The Home Ins. Co. v. Duke, 75 Ind. 535.

As to what will amount to an insurable interest, see 4 Waite's Ac. & Def. 222 et seq., and cases cited.

(c.) *Description of property, what sufficient.* The Aurora, etc., Ins. Co. v. Johnson, 46 Ind. 315; Aetna Ins. Co. v. Black, 80 Ind. 513.

(d.) *Must show notice and proof of loss* by a statement of the facts, "Duly notified" not enough, or by the code allegation that plaintiff has duly performed all of the conditions on his part. The Home Ins. Co. v. Duke, 43 Ind. 418; The Peoria, etc., Ins. Co. v. Walser, 22 Ind. 73; The American Ins. Co. v. Leonard, 80 Ind. 272; The Aetna Ins. Co. v. Kittles, 81 Ind. 96.

But foreign companies can not require notice of loss within less than five days. R. S. 1881, § 3770.

As to the time when notice must be given, see The Railway, etc., Assurance Co. v. Burwell, 44 Ind. 460.

(e.) *Certificate of magistrate or notary.* Where the policy requires a certificate of the loss by a magistrate or notary a performance of the condition must be shown, either by the general allegation of performance of all conditions or a specific statement of the facts constituting such performance. The Protection, etc., Ins. Co. v. Pherson, 5 Ind. 417; The Home Ins. Co. v. Duke, 43 Ind. 418.

But it is held that a foreign insurance company can not require this certificate under the statute. If so, the allegation of performance of the condition, although required by the statute, is unnecessary. R. S. 1881, § 3770; The Aurora Ins. Co. v. Johnson, 46 Ind. 315.

(f.) *That house was occupied.* It is held that if the policy provides that if the house insured ceases to be occupied the policy shall cease to be valid the complaint must allege that the house was occupied at the time of the loss. Aetna Ins. Co. v. Black, 80 Ind. 513. See also Aetna Ins. Co. v. Meyers, 63 Ind. 238.

(g.) *Value of property insured.* The authorities in this state seem to require

an allegation of the value of the property insured at the time of the loss, in order to recover more than nominal damages. *The American Ins. Co. v. Leonard*, 80 Ind. 272; *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

(h.) *Application need not be set out.* It is held that the application for the insurance need not be set out, although it is made a part of the policy by its terms. *The Mutual, etc., Ins. Co. v. Cannon*, 48 Ind. 264; *The Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Continental, etc., Ins. Co. v. Kessler*, 84 Ind. 310.

2. Assignment of policy. There may be an assignment of the policy, but it must be in accordance with the terms of the charter of the company, and of the policy; and in an action by an assignee, such an assignment must be shown, or he can not recover. *The American Ins. Co. v. Gallagher*, 50 Ind. 209.

3. Waiver of performance of condition precedent. The performance of conditions precedent may be waived by the company. If so, in place of the allegation of performance, the complaint should contain an allegation of the facts constituting such waiver. It is not sufficient to allege a waiver in general terms. *Grant v. The Lexington, etc., Ins. Co.*, 5 Ind. 23; *Byrne v. The Rising Sun Ins. Co.*, 20 Ind. 103; *New England, etc., Ins. Co. v. Robinson*, 25 Ind. 536; *The Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73; *The New England, etc., Ins. Co. v. Hasbrook*, 32 Ind. 447; *The Home Ins. Co. v. Duke*, 43 Ind. 418; *Behler v. The German, etc., Ins. Co.*, 68 Ind. 347; *The Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *The Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *The Masonic, etc., Ass'n v. Beck*, 77 Ind. 203; *Willcutts v. The Northwestern, etc., Ins. Co.*, 81 Ind. 300.

As to the power of an agent to waive such conditions, and what will amount to a waiver, see: *The Kentucky, etc., Ins. Co. v. Jenks*, 5 Ind. 96; *The United Life, etc., Ins. Co. v. The President, etc., of the Ins. Co. of North Am.*, 42 Ind. 588; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Willcutts v. The Northwestern, etc., Ins. Co.*, 81 Ind. 300; *John Hancock Mut. Life Ins. Co. v. Daly*, 65 Ind. 6; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362.

4. Insurance by mortgagee—Who should sue. It is held that where a mortgagee procures insurance on the property *for the benefit of the mortgagor*, under an agreement that any money realized therefrom shall be applied on the debt and credited as a payment, the mortgagor is the proper party to sue on the policy. *The Ætna Ins. Co. v. Baker*, 71 Ind. 102.

But where the mortgagee insures his own interest in the property for his own benefit, he is the proper plaintiff.

So where the owner's interest is insured, loss, if any, payable to an incumbrancer, the incumbrancer may maintain the action and recover the whole amount. *Salmon v. The Niagara Fire Ins. Co.*, 60 N. Y. 619; *Norman v. The Glen's Falls Ins. Co.*, 65 N. Y. 6; *Frink v. The Hampden Ins. Co.*, 31 How. Pr. 30; *Pomeroy's Rem.*, § 139.

If there is any dispute between the owner and the incumbrancer, it is held that the company may require an interpleader. *Salmon v. The Niagara Fire Ins. Co.*, 60 N. Y. 619.

But this is unnecessary, as the incumbrancer would hold the money recovered as a trustee of the owner, and his action would bar a recovery by the latter.

5. Contract to insure—Necessary allegations. In suing upon a contract to insure, the action is upon the parol contract, and the policy agreed to be issued need not be set out; nor is it necessary to allege performance of what would, under the policy, have been conditions precedent, as the refusal to issue the policy is a waiver of such performance. *New England, etc., Ins. Co. v. Robinson*, 25 Ind. 536.

But the complaint must allege facts, showing a binding contract to insure, a breach of the contract, and damages.

As to what will amount to a binding contract of insurance, see: *New England, etc., Ins. Co. v. Robinson*, 25 Ind. 536; *The Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73; *American, etc., Ins. Co. v. Patterson*, 28 Ind. 17; *Barr v. The Ins. Co of North Am.*, 61 Ind. 488.

SECTION XLVI.

LIFE INSURANCE.

236. By administrator.

[Caption and commencement.]

That on the — day of —, 18—, in consideration of the payment of the premium of — dollars annually [quarterly] during life, the defendant executed its policy of insurance, in writing, to one —, on his life, in the sum of — dollars, a copy of which policy is filed herewith, and made a part of this complaint.

That on the — day of —, 18—, said — died, and letters of administration were duly issued on his estate to plaintiff, on the — day of —, 18—, by the — Circuit Court, who thereupon duly qualified as such.

That up to the time of the death of said —, all premiums accrued on said policy had been duly paid.

That said — and plaintiff each duly performed all the conditions of said policy on their part to be performed, and plaintiff more than — days before this action, to wit, on the — day of —, 18—, gave to defendants due notice and proof of the death of said —, and demanded payment of said policy, but no part thereof has been paid, and the same is now due.

Wherefore, plaintiff demands judgment for — dollars.

[Copy of policy.]

[Signature.]

237.—Assignment in trust for wife.

[*Substitute for averment of appointment of administrator in the preceding Form.*] That on the — day of —, 18—, said —, with the written consent of defendant [*state such consent as the policy requires*], duly assigned said policy to the plaintiff, in trust for —, the wife of said —.

238.—By wife of insured.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, in consideration of the payment to it of a premium of — dollars, annually [*or otherwise*], executed to the plaintiff a policy of insurance on the life of —, for — dollars, a copy of which is filed herewith, and made a part of this complaint.

That said — died on the — day of —, 18—, at —.

That at the time said policy was issued, and until his death, plaintiff was the wife of said —.

That on the — day of —, 18—, the plaintiff furnished the defendant with proof of the death of said —, and performed all of the conditions of said policy on her part to be performed.

That defendant has not paid said sum, or any part thereof, and the same is now due.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of policy.*]

[*Signature.*]

Non-payment of premium. See ANSWER, p. 375.

1. Notice of death. Notice of the death must be given within a reasonable time, and whether this has been done or not is a question of fact for the jury. *The Provident, etc., Ins. Co. v. Baum*, 29 Ind. 236.

2. Assignment of policy. To entitle an assignee to recover on a policy, he must have an interest in the life of the insured. He can not purchase and take an assignment of the policy, if he has no insurable interest. *The Franklin Ins. Co. v. Hazzard*, 41 Ind. 116; *The Franklin Ins. Co. v. Sefton*, 53 Ind. 380; *Harley v. Heist*, 86 Ind. 196.

As to the manner of making the assignment, see *Bushnell v. Bushnell*, 92 Ind. 503; *Dannon v. Penn., etc., Ins. Co.*, 99 Ind. 478.

3. Policy, how descends. *Huston v. Merrifield*, 51 Ind. 24; *Wilburn v. Wilburn*, 83 Ind. 55; *Harley v. Heist*, 86 Ind. 196.

4. Application need not be set out. *Continental Ins. Co. v. Kessler*, 84 Ind. 310.

5. Insurable interest. If the insured takes out a policy for a third party, the complaint need not show that such beneficiary had an insurable interest in his life. But when the third party procures the insurance, an allegation of the

facts, showing that he has an insurable interest, is necessary. *Provident Life Ins. Co v. Baum*, 29 Ind. 236; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; *Elkhart, etc., Ass'n. v. Houghton*, 98 Ind. 149.

As to what will amount to an insurable interest, see *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; *Lord v. Dall*, 7 Am. Dec. 38, 42, and note.

6. Necessary allegations. *The Excelsior, etc., Aid Ass'n v. Riddle*, 91 Ind. 84.

For further authorities, see FIRE INSURANCE, pp. 172-177, and notes.

SECTION XLVII.

MARINE INSURANCE.

239.—On valued policy.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was the owner of the steamboat —, and on said day, in consideration of the premium of — dollars paid, defendant duly executed to plaintiff its policy of insurance, a copy of which is filed herewith, and made a part of this complaint, whereby it insured him in the sum of — dollars against loss or damage from the perils of the river [*or mention the particular peril which caused the loss*] upon said boat, then at —, for a voyage from — to —.

That on the — day of —, 18—, said steamboat proceeded from — on said voyage, and while on her way [*or, during said voyage and while lying in the port of —*] was, by the perils of the river [*or name the peril*] *, wrecked and totally lost.

The plaintiff was the owner of said steamboat at the time of said loss.

That plaintiff duly performed all the conditions of said policy on his part to be performed, and more than — days before this action, to wit, on the — day of —, 18—, gave defendant due notice and proof of said loss, and demanded payment of said policy, which was refused, and there is now due thereon and unpaid the sum of — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of policy.*]

[*Signature.*]

240.—Claim for general average.

[*Follow preceding form to *, and substitute for the words “wrecked and totally lost” the following:*] stranded and damaged in her hull, machinery, and appurtenances, whereby it became necessary, for the preservation

of the boat and her cargo, to throw overboard a part of said cargo, and the same was thrown over for that purpose. By reason thereof, plaintiff was compelled to and did expend — dollars in repairing said boat at —, and also — dollars as contribution for the loss caused by throwing overboard said part of the cargo.

That said boat also suffered damage beyond what was repaired to the extent of — dollars, all of which is due and unpaid.

Wherefore, etc.

[Signature.]

[Copy of policy.]

241.—Open policy—For account of whom it may concern.

[Caption and commencement.]

That on the — day of —, 18—, defendant executed to plaintiff its policy of insurance, a copy of which is filed herewith, and made a part of this complaint, whereby, in consideration of — dollars, it agreed to insure him, on account of whom it may concern, loss, if any, to be paid to plaintiff, against all loss or damage by reason of the perils of the sea or of fire on the cargo then laden and about to be laden on the steamboat —, then at —, and during her next voyage from — to — [or, for the space of — months therefrom], not exceeding — dollars [or, on all shipments for the space of — months therefrom, in such amounts as should be specified on application and mutually agreed upon from time to time and indorsed on the policy; and on the — day of —, 18—, it was mutually agreed that the amount of insurance under said policy should be — dollars, and the same was by defendant indorsed on said policy, a copy of which indorsement is filed herewith, and made a part of this complaint].

That on the — day of —, 18—, said steamboat proceeded from — on the said voyage, and while on her way was, by the perils of the river [or *name the peril*], wrecked, and said cargo was totally lost and destroyed [or *allege the facts, as in Form 240, if for general average*].

That plaintiff duly performed all of the conditions of said policy on his part to be performed, and on the — day of —, 18—, gave defendant due notice and proof of said loss, and demanded payment of said policy, which was refused, and there is now due and unpaid thereon — dollars, for which plaintiff demands judgment.

[Copy of policy and indorsement.]

[Signature.]

1. Necessary allegations. Where the policy is an open one, and is to insure such sums as may be agreed upon and indorsed thereon, it must be alleged that a sum stated was agreed upon and indorsed upon the policy. *Crane v. The Evansville Ins. Co.*, 13 Ind. 446.

2. Construction of policy. *The Franklin Ins. Co. v. Humphrey*, 65 Ind. 549.

For further authorities bearing on insurance generally, see **FIRE INSURANCE**, p. 172; **LIFE INSURANCE**, p. 177.

SECTION XLVIII.

INTERPLEADER.

242.—General form.

[*Caption and commencement.*]

That on the — day of —, 18—, one A. B. delivered to plaintiff [being a warehouseman], [*or state for what purpose delivered*] a — [*state what*].

That on the — day of —, 18—, the defendant, C. D., notified plaintiff that he was the owner thereof, under an assignment from said A. B., and demanded a delivery thereof to him, and at the same time the defendant, E. F., notified plaintiff that he was the owner thereof, under an order of said A. B., and demanded the possession of the same.

That plaintiff is ignorant of the rights of said defendants, and has no interest in said property, and is ready and willing to deliver it to the person entitled thereto.

That each of said defendants threatens to, and will, unless restrained by this court, sue the plaintiff for the recovery of said property.

That this action is not brought by collusion with either of the defendants.

Wherefore, plaintiff prays that defendants be required to interplead together concerning their claims to said property, and be enjoined from taking any proceedings against plaintiff in regard thereto; and that plaintiff be allowed to deliver said property to some person designated by the court to receive the same, and that he be thereupon discharged from all liability in relation thereto.

[*Verification.*]

[*Signature.*]

1. Statutory interpleader. The code provides for an interpleader by way of answer, which will be considered in its proper place. See **ANSWER**, p. 332; ante, vol. 1, § 171 et seq.

But this remedy does not supersede the action of interpleader. *McKay v. Draper*, 27 N. Y. 256.

SECTION XLIX.

JUDGMENTS.

243.—General form.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff recovered a judgment in the — Circuit Court against the defendant for the sum of — dollars, which bears interest at the rate of — per cent per annum.

That said judgment is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

244.—On judgment of court of inferior jurisdiction.

[Caption and commencement.]

That on the — day of —, 18—, in an action then pending before —, a justice of the peace of — township, — county, State of —, plaintiff recovered judgment against the defendant for the sum of — dollars and costs, amounting to — dollars, which bears interest from date at — per cent per annum.

That said judgment was duly given.

That the same is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

245.—By assignee.

[Caption and commencement.]

That on the — day of —, 18—, one — recovered judgment in the — Circuit Court of the State of Indiana against the defendant for the sum of — dollars and costs, amounting to — dollars, which bears interest from its date at — per cent per annum.*

That on the — day of —, 18—, the said —, by indorsement on [*or, attached to*] said judgment, and duly attested by the clerk of said court, assigned said judgment to the plaintiff [*or, on the — day of —, 18—, said —, by assignment, not indorsed on or attached to said judgment, transferred the same to the plaintiff, and he is made a defendant herein to answer as to said assignment*].

That said judgment is now due and wholly unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

246.—Against replevin bail.

[Follow preceding form to *, and allege]. That on the — day of —, 18—, the defendant, —, by his recognizance, duly entered of record immediately following said judgment, became responsible as replevin bail for the payment thereof, and said recognizance was duly approved at the time by the clerk of said court.

That the stay of execution on said judgment expired on the — day of —, 18—. [Continue as in the preceding form from *.]

1. What judgments may be sued upon. Ante, vol. 1, §§ 398, 1068.

2. Replevin bail. As to the proper manner of entering replevin bail and the extent of liability thereon, see ante, vol 1, §§ 1040 et seq.; *Hansford v. Van Auken*, 79 Ind. 157; *Hopper v. Lucas*, 86 Ind. 43; post, p. 637.

3. Necessary allegations. R. S. 1881, § 369; ante, vol. 1, § 398; vol. 2, § 1068; *The Bloomfield R. R. Co. v. Burress*, 82 Ind. 83; *Hopper v. Lucas*, 86 Ind. 43; *Lucas v. Hawkins*, 102 Ind. 64.

4. Assignment of—Parties. As to the manner in which judgments may be assigned, and when the assignor is a necessary party, see ante, vol. 1, §§ 38, 40.

5. Where action may be brought. Ante, vol. 1, § 1068.

247. To review judgment for errors of law and the discovery of new matter.

[Caption.]

FIRST PARAGRAPH.

[Commencement.]

That on the — day of —, 18—, defendant brought his action in this court to [state the grounds of the action], and on the — day of —, 18—, recovered judgment therein against this plaintiff for — [state what].

A full and complete copy of the record of the proceedings and judgment in said cause are filed herewith, and made a part of this complaint.

The plaintiff alleges the following errors of law appearing in said proceedings and judgment:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling this plaintiff's demurrer to the second paragraph of the complaint.

3. The court erred in sustaining the demurrer to the second paragraph of this defendant's answer.

4. The court erred in overruling this plaintiff's motion for judgment in his favor on the special findings of the jury, notwithstanding the general verdict.

5. The court erred in overruling this plaintiff's motion for a *venire de novo*.

6. The court erred in overruling this plaintiff's motion for a new trial.

7. The court erred in overruling this plaintiff's motion in arrest of judgment.

Wherefore, the plaintiff prays the court that said judgment be in all things reversed.

SECOND PARAGRAPH.

[*Commencement.*]

That on the — day of —, 18—, in an action then pending in this court, the defendant herein recovered a judgment against this plaintiff for — [*state what*].

A full and complete copy of the record of the proceedings and judgment in said cause, filed with and made a part of the first paragraph of this complaint, is hereby referred to, and made a part of this paragraph.

That since the trial of said cause, and the rendition of said judgment, the plaintiff has discovered that [*state the new matter discovered, e. g.*], the property for which the note sued on was given, was not the property of the defendant herein, but had been stolen by him from one —, who, on the — day of —, claimed the same as his, and plaintiff was compelled to give the same up, and said note was wholly without consideration.

That this plaintiff had no knowledge that said property was not the property of the defendant until after the rendition of said judgment, and for that reason did not plead or attempt to prove a want of consideration for said note.

That at the time he purchased said property, and gave said note therefor, he made inquiry of the defendant, and other persons, as to his title thereto, and was told that he was the owner thereof.

That said property was stolen at —, in the State of —, and plaintiff could not, by reasonable diligence, have discovered said fact before the recovery of said judgment.

Wherefore, plaintiff prays the court that said judgment be reversed, and all other proper relief.

[*Signature.*]

[*Verification.*]

[*Copy of record.*]

1. Necessary allegations. R. S. 1881, §§ 615, 616, 617; ante, vol. 1, §§ 1049, 1051 et seq.; *Whitehall v. Crawford*, 67 Ind. 84; *Terry v. Bronnenberg*, 87 Ind. 95; *Peoria, etc., R. W. Co. v. Flicker*, 95 Ind. 180; *McCauley v. Murdock*, 97 Ind. 229; *Tachan v. Fiedeldey*, 81 Ind. 54; *Sheat v. Joray*, 86 Ind. 70; *Debolt v. Debolt*, 86 Ind. 521; *Funk v. Davis*, 103 Ind. 281,

In many of the cases, it is said that the complaint must show the filing of a bill of exceptions in time, and that an exception was taken at the proper time; and so of other facts necessary to entitle the plaintiff to a reversal of the judgment. But it must not be understood that there must be an averment of each of these facts in the body of the complaint. They should appear on the face of the record, which, being filed, is a part of the complaint, and to allege them in the complaint would be an unnecessary repetition, if they do appear in the record, and useless if they do not, as their absence from the record will be fatal, and they can not be supplied by a mere allegation of the fact. *Peoria, etc., R. W. Co. v. Flicker*, 95 Ind. 180.

248.—To set aside judgment for fraud.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant brought his action against the plaintiff in this court [*or, the — Circuit Court*], on a promissory note, alleging that there was due him thereon — dollars [*or state the cause of action pleaded*].

That plaintiff filed his answer, denying the allegation of said complaint, and pleading an offset against defendant of an account on which he alleged there was due him — dollars [*or state any other defense set up*].

That on the — day of —, 18—, while said action was still pending, plaintiff and defendant had a full and final settlement of the matters involved therein, and found there was due from plaintiff to defendant — dollars, which he then paid in full settlement of the difference between them [*or state any other compromise*], in consideration of which the plaintiff promised and agreed to dismiss said action and pay the costs immediately.

That in violation of his said agreement, defendant did not dismiss said action, but, in the absence of this plaintiff, and without his knowledge or consent, called said cause for trial, and upon failure of plaintiff to appear, took judgment against him on the — day of —, 18—, for — dollars [*or state what judgment was recovered*].

That defendant is about to enforce said judgment by execution, and will do so unless prevented by this court.

Wherefore, plaintiff prays the court that said judgment be declared void and vacated, and that defendant be enjoined from enforcing the same.

[*Signature.*]

1. For what causes judgments may be vacated. The remedy of a party against whom a judgment is wrongfully or illegally rendered, is not confined to the modes provided by statute. The courts have jurisdiction, independent of the code, to declare void a judgment obtained by fraud. *Ante*, vol. 1, § 1057; *Johnson v. Unversaw*, 30 Ind. 435; *Neallis v. Dicks*, 72 Ind. 374; *Earle v. Earle*, 91 Ind. 27; *Hogg v. Link*, 90 Ind. 346; *Duringer v. Moschind*, 93 Ind. 495; *Overton v. Rogers*, 99 Ind. 695; *Rosa v. Prather*, 103 Ind. 191.

So where the judgment is void, or voidable for other reasons. *Ante*, vol. 1, § 1057; *Willman v. Willman*, 57 Ind. 500; *Earle v. Earle*, 91 Ind. 27; *Cain v. Goda*, 84 Ind. 209; *Leary v. Dyson*, 98 Ind. 317.

As to what will constitute sufficient ground for vacating a judgment, see cases cited above, and *Epstein v. Greer*, 93 Ind. 140; *Woods v. Brown*, 93 Ind. 164; *post*, p. 602.

249.—To set aside judgment by default on ground of surprise or excusable neglect.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant brought his action in this court against this plaintiff, on a promissory note alleged to have been executed to him by plaintiff on the — day of —, 18—.

That such proceedings were had therein.

That on the — day of —, 18—, defendant recovered a judgment against plaintiff by default, for — dollars, and — dollars costs.

That said default and judgment was taken against the plaintiff, through his mistake, inadvertence, and excusable neglect [*or allege either mistake, inadvertence or excusable neglect*], in this: [*state fully the excuse for not making a defense, e. g.*]

That the summons was served upon him by copy left at his residence, in this county, when he and his family were absent from home at —.

That he did not return to his home until the — day of —, 18—, when he found said copy of said summons.

That until then he had no knowledge whatever that said suit had been commenced.

That immediately upon learning the fact, he went to —, where said suit was brought, to employ counsel to appear for him and defend said action, when he learned for the first time that said judgment had already been taken against him.

That he has a valid and meritorious defense to said action in this: [*set out the defense or defenses fully*] and would have pleaded and proved the same but for the facts above stated.

Wherefore, he prays the court that said judgment and the default taken against him be set aside, and that he be allowed to make his defense. [*Signature.*]

[*Verification.*]

1. Necessary allegations. Ante, vol. 1, §§ 460, 462; *Nichols v. Nichols*, 96 Ind. 433; *Ammerman v. The State*, 98 Ind. 165; *Birch v. Frantz*, 77 Ind. 199; *Brumbaugh v. Stockman*, 83 Ind. 583; *Lee v. Basey*, 85 Ind. 543; *Overton v. Rogers*, 99 Ind. 595; *Neitert v. Trentman*, 4 N. E. Rep. 306.

2. What sufficient cause. Ante, vol. 1, § 462; *McClain v. Davis*, 77 Ind. 419; *Cruse v. Cunningham*, 79 Ind. 402; *Lawler v. Couch*, 80 Ind. 369; *Brumbaugh v. Stockman*, 83 Ind. 583; *Zerger v. Flattery*, 83 Ind. 399; *Burkhart v. Merry*, 88 Ind. 438; *Bowen v. Bragunier*, 88 Ind. 558; *Nash v. Cars*, 92 Ind. 216; *McGaughey v. Woods*, 92 Ind. 296; *Woods v. Brown*, 93 Ind. 164; *Kreite v. Kreite*, 93 Ind. 583; *De Armond v. The Preachers' Aid Society*, 94 Ind. 59; *Wills v. Browning*, 96 Ind. 149; *Rosa v. Prather*, 103 Ind. 191.

SECTION L.

LANDLORD AND TENANT.

250.—Heir of lessor against assignee of lessee for rent.

[*Caption and commencement.*]

That on the — day of —, 18—, one A. B., being the owner in fee-simple and in possession [*if a termor say*: being lawfully possessed for the residue of a term of — years, beginning on the — day of —, 18—] of a certain dwelling-house and lot situated at —, by a certain lease, a copy of which is filed herewith, and made a part of this complaint, demised the same to one — for the term of — years from that date; said —, for himself, his executors, administrators, and assigns covenanting therein to pay therefor yearly to said —, his heirs or assigns, the rent of — dollars, payable — dollars monthly, on the — day of each and every month.

That on the — day of —, 18—, said A. B. died seized of the reversion in said premises, which thereupon descended to plaintiff as only child and heir of said A. B., and plaintiff thereupon became seized thereof in fee [*or, for said term*].

That on the — day of —, 18—, all the estate and term of years then unexpired of said — in said premises, by assignment then made by him, vested in the defendant, who thereupon entered into and became possessed of said premises.

That plaintiff and said A. B. duly performed all of the conditions of said lease on their part to be performed.

That the installments of rent falling due during the time that defendant was so possessed of the premises, to wit, on the — day of

—, 18—, and on the — day of —, 18—, are now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of lease.*]

[*Signature.*]

1. Who entitled to rents on death of lessor. R. S. 1881, §§ 5220, 5221; *Doe v. Lanus*, 3 Ind. 441; *King v. Anderson*, 20 Ind. 385; *Rubottom v. Morrow*, 24 Ind. 202; *Hendrix v. Hendrix*, 65 Ind. 329; *McDowell v. Hendrix*, 67 Ind. 513; *Burbank v. Dyer*, 54 Ind. 392.

251.—Averment by assignee of lessor.

[*In lieu of the allegation of the death of the lessor and heirship of plaintiff in preceding form, say:*] That on the — day of —, 18—, said A. B., for a valuable consideration, by his warranty deed of that date, duly executed, conveyed said reversion to plaintiff.

252.—By lessor against lessee for non-payment of rent.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, by a lease, executed by plaintiff and defendant, a copy of which is filed herewith, and made a part of this complaint, demised to the defendant the premises therein described, then owned by plaintiff and in his possession, for the term of —.

That the defendant covenanted and agreed in said lease to pay plaintiff, as rent for said premises, — dollars, payable — dollars on the — day of each and every month.

That plaintiff has fully performed all of the conditions on his part to be performed.

That on the — day of —, 18—, defendant took possession of said premises, and has ever since used and occupied the same.

That defendant has not paid said rent, or any part of it, and there is now due plaintiff thereon and unpaid — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of lease.*]

[*Signature.*]

253.—On quantum valebat for use and occupation.

[*Caption and commencement.*]

That defendant occupied the dwelling-house, No. —, on — street, in —, the property of plaintiff, by plaintiff's permission, as his tenant, from the — day of —, 18—, until the — day of —, 18—.

That the use of said premises for said time was reasonably worth — dollars.

That there is now due plaintiff of said sum — dollars, which is unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

For form in action for a fixed rent, see Form 22, p. 13.

1. Necessary allegations. *Mason v. Seitz*, 36 Ind. 516; *Elmer v. Sand Creek Tp.*, 38 Ind. 56; *Nance v. Alexander*, 49 Ind. 516; *Winings v. Wood*, 53 Ind. 187; *Pittsburg, etc., Ry. Co. v. Thornburg*, 98 Ind. 201.

2. Rent, when due. *Elmer v. Sand Creek Tp.*, 38 Ind. 56.

254.—To recover taxes agreed to be paid by lessee.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff, by a lease, a copy of which is filed herewith, and made a part of this complaint, demised to defendant the premises therein described, for the term of — years therefrom.

That defendant covenanted in said lease to pay all taxes, charges, or assessments, when due and payable, that might be levied on the land [*plead the covenant as it is in the lease*].

That there was duly levied on said premises, for the year —, a tax of — dollars, which became due and payable on the — day of —, 18—, which defendant did not pay, but allowed the same to become delinquent, whereby plaintiff was, on the — day of —, 18—, compelled to pay the same, together with penalty and interest, amounting in all to — dollars, which is now due from defendant to plaintiff and unpaid.

That plaintiff has duly performed all of the conditions of said lease on his part to be performed.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of lease.*]

[*Signature.*]

255.—Lessee against lessor on covenant to keep in repair.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his lease, a copy of which is filed herewith, and made a part of this complaint, demised to plaintiff the premises therein described, for the term of — from that date, at a yearly rent of — dollars.

That defendant covenanted in said lease [*state what, e. g.*], to keep the same in good and tenantable repair suitable for a hardware store.

That plaintiff entered into possession of said premises on the — day of —, 18—, and used the same for storing and selling hardware.

That defendant failed to keep said premises in good and tenantable repair suitable for a hardware store, but allowed the roof to become and remain leaky, by means whereof the water has entered said premises and destroyed a part of plaintiff's hardware, and injured other parts, to his damage — dollars, for which he asks judgment.

[*Copy of lease.*]

[*Signature.*]

256.—Lessor against lessee—Breach of covenants.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff, by his lease, a copy of which is filed herewith, and made a part of this complaint, demised to defendant, for the term of —, the premises therein described.

That defendant covenanted thereby, that — [*copy the covenant and conditions precedent to be performed by plaintiff, if any*].

That plaintiff duly performed all of the conditions on his part to be performed.

That defendant did not [*state what, e. g.*], at all times, keep said tenements and appurtenances in good repair, but, on the contrary, ever since the — day of —, 18—, has suffered the same to decay and become ruinous for want of needful repairs [*although no casualty happened thereto by fire (or other exception in the contract)*]; whereby [*state any special damages caused by the breach*], to plaintiff's damage — dollars, for which he demands judgment.

[*Signature.*]

[*Copy of lease.*]

257.—Against purchaser of lessee's interest on covenant to insure.

[*Caption and commencement.*]

That on the — day of —, 18—, by a lease, a copy of which is filed herewith, and made a part of this complaint, defendant, A. B., demised to C. D. the real estate therein described for the term of — years from that day.

That, by one of the covenants in said lease, said C. D. was to keep said premises insured, for the benefit of the lessor, in the sum of — dollars, and if at any time the lessee should fail to keep the same so insured, said lessor might cause an insurance to be placed on said

premises, at the expense of the lessee, in the name and for the benefit of the lessor.

That on the — day of —, 18—, the said A. B. sold and assigned to plaintiff all of his interest in said lease, and on the — day of —, 18—, the interest of said C. D. in said premises and lease was sold under an order of the — Circuit Court to the defendants, E. F. and G. H., who then took possession under said lease for the remainder of said term.

That a policy of insurance on said premises, procured by said C. D., expired on the — day of —, 18—, and plaintiff notified defendants to insure said premises pursuant to said covenant in said lease, which they failed and refused to do.

That on the — day of —, 18—, plaintiff procured insurance on the same, pursuant to said covenant, and expended therefor — dollars, which sum is now due him from the defendants and unpaid.

The defendant, A. B., is made a party to answer as to his assignment of said lease to plaintiff.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of lease.*]

[*Signature.*].

258.—On covenant for quiet enjoyment.

[*Caption and commencement.*]

That on the — day of —, 18—, by a certain lease, a copy of which is filed herewith, and made part of this complaint, defendant leased to plaintiff, for — years from that date, the building known as No. —, — street, in —, at a rent of — dollars per annum.

That defendant, in said lease, covenanted with plaintiff in the words following to wit: [*copy covenant, or state its legal effect, e. g.*] that plaintiff should peaceably and quietly enjoy said premises for said term, without let or hinderance from —.

That plaintiff has not been allowed to enjoy said premises, but on the contrary, on the — day of —, 18—, one —, who was at the time of the making of said lease and thereafter until said day, lawfully entitled to the possession [*was the lawful owner*] of said premises, entered on the same and ejected plaintiff therefrom, and has ever since kept him out of possession.

[*If special damages, state them, e. g.*] That plaintiff, in reliance on said covenant, had opened a grocery store on said premises, and purchased a large stock of groceries and placed them in said store, and by reason of said eviction he was compelled to expend, and did ex-

pend, — dollars in removing his stock therefrom, and said stock was deteriorated in value by such removal — dollars, and plaintiff suffered great losses in the custom of said business by said removal, to his damage — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of lease.*]

[*Signature.*]

259.—For purchase-money for surrender of lease.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was possessed of a leasehold estate in a dwelling-house in —.

That defendant, who was then the owner of the reversion, on said day agreed with plaintiff to pay him the sum of — dollars for a surrender to defendant of said leasehold estate, and plaintiff thereupon, in consideration of said agreement, surrendered said estate, and delivered possession of said premises to defendant.

That said sum of — dollars is now due to plaintiff and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

1. What will create relation of landlord and tenant. R. S. 1881, § 5222; *Gallager v. Himelberger*, 57 Ind. 63; *Powell v. De Hart*, 55 Ind. 94; *Yater v. Mullen*, 23 Ind. 562; *Kralemayer v. Brink*, 17 Ind. 509; *Knight v. The Indiana Coal and Iron Co.*, 47 Ind. 105; *Jarvis v. Sutton*, 3 Ind. 289; *Dougherty v. Dougherty*, 7 Blkf. 277; *Mattox v. Hightshue*, 39 Ind. 95; *Alcorn v. Morgan*, 77 Ind. 184; *Cressler v. Williams*, 80 Ind. 366; *Miller v. Cheney*, 88 Ind. 466; *Davis v. Watts*, 90 Ind. 372; *Hoffman v. McCollum*, 93 Ind. 326.

2. When landlord or tenant bound to make repairs, and extent of liability. *Block v. Ebner*, 54 Ind. 544; *Kellenberger v. Foresman*, 18 Ind. 475; *Estep v. Estep*, 23 Ind. 114; *Biddle v. Reed*, 33 Ind. 529; *Skillen v. The Water Works Co.*, 49 Ind. 193; *Buck v. Rogers*, 39 Ind. 222; *Hickman v. Rayle*, 55 Ind. 551; *Floyd v. Maddux*, 68 Ind. 124; *Baynes v. Chastain*, 68 Ind. 376; *Purcell v. English*, 86 Ind. 34.

3. Destruction of premises by fire. When relieves tenant from payment of rent. *Womack v. McQuarry*, 28 Ind. 103.

4. Assignees of lessor and lessee, rights and liabilities of. *Hammond v. Sexton*, 69 Ind. 37; *McDowell v. Hendrix*, 67 Ind. 513; *Blair v. Hamilton*, 48 Ind. 32; *I. M. & C. Union v. C. C. C. & I. R. Co.*, 45 Ind. 281; *Hopkins v. Organ*, 15 Ind. 188; *Taylor v. Taylor*, 64 Ind. 356; *Gordon v. George*, 12 Ind. 408; *Kennard v. Harvey*, 80 Ind. 37; *Lennen v. Lennen*, 87 Ind. 130.

5. How lease may be assigned or surrendered. *Ross v. Schneider*, 30 Ind. 423; *Woodward v. Lindley*, 43 Ind. 333; *Tolls v. Orth*, 75 Ind. 298.

260.—Landlord against tenant for possession and damages.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff leased to the defendant, for the term of one year from that date, the following real estate in the county of —, State of Indiana: [*describe it.*]

That said tenancy expired on the — day of —, 18—.

That ever since the expiration of said tenancy the plaintiff has been, and now is, entitled to the possession of said premises, and the defendant unlawfully holds over and detains the possession from plaintiff, whereby he has been damaged in the sum of — dollars.

Wherefore, plaintiff demands judgment for the possession of said real estate and for — dollars damages. [*Signature.*]

1. Necessary allegations. Whipple *v.* Shewalter, 91 Ind. 114; Wheeler *v.* Reitz, 92 Ind. 379; Fry *v.* Day, 97 Ind. 348; Jolly *v.* Ghering, 40 Ind. 139.

2. Parties. Tenant in common can not sue alone. Dorsett *v.* Gray, 98 Ind. 273.

3. Holding over, when creates new tenancy. Bright *v.* McQuat, 40 Ind. 521; Burbank *v.* Dyer, 54 Ind. 392; Whetstone *v.* Davis, 34 Ind. 510; Falley *v.* Giles, 29 Ind. 114; Thiebaud *v.* The First National Bank of Vevay, 42 Ind. 212; Tolle *v.* Orth, 75 Ind. 298; Montgomery, *v.* The Board of Commrs. etc., 76 Ind. 362; Rothschild *v.* Williamson, 83 Ind. 387; Coomler *v.* Hefner, 86 Ind. 108; Terstegge *v.* The First German, etc., Soc., 92 Ind. 82; Bollenbacker *v.* Fritts, 98 Ind. 50; Barnett *v.* Feary, 101 Ind. 95.

261.—For possession on ten days' notice.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff leased to defendant, for the term of one year from that date, the following real estate in the county of —, State of Indiana: [*describe it.*]

That defendant agreed to pay as rent therefor — dollars per month, payable on the — day of each and every month.

That defendant did not pay the installment of rent which fell due on the — day of —, 18—.

That on the — day of —, 18—, plaintiff notified defendant, in writing, to deliver up to him, at the expiration of ten days from the time of receiving said notice, the possession of said premises, unless the rent due therefor should be paid within that time.

That defendant has not paid said rent, or any part of it, nor delivered to plaintiff the possession of said real estate, but has, since the expiration of said notice [*or, since the — day of —, 18—*], un-

lawfully held over and detained possession of said premises from the plaintiff, whereby plaintiff has sustained damages in the sum of — dollars.

Wherefore, plaintiff demands judgment for the possession of said real estate and for — dollars damages. [Signature.]

As to forms of notices to quit and when necessary, see NOTICE, p. 000.

262.—Forcible entry and detainer.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff was in the lawful and peaceable possession of the following real estate in the county of —, State of Indiana [*describe it*], and has ever since been, and still is, entitled to the possession thereof.

That on said — day of —, 18—, the defendant, with strong hand, unlawfully and forcibly entered into and upon said real estate, and has ever since, and does now, unlawfully, forcibly, and with strong hand, hold possession thereof, whereby plaintiff has been damaged in the sum of — dollars.

Wherefore, plaintiff demands judgment for the possession of said real estate and for — dollars damages. [Signature.]

263.—Forcible detainer.

[Caption and commencement.]

That on the — day of —, 18—, the defendant peaceably entered upon and took possession of the following real estate in the county of —, State of Indiana: [*describe it*.]

That since the — day of —, 18—, plaintiff has been, and is now, lawfully entitled to possession thereof.

That on the — day of —, 18—, the defendant forcibly, unlawfully, and with strong hand, kept the plaintiff out of possession of said lands, and has ever since, and does now, unlawfully, forcibly, and with strong hand, keep and hold possession thereof, and excludes the plaintiff therefrom.

Whereby plaintiff has been damaged in the sum of — dollars, for which he asks judgment, and for the possession of said premises.

[Signature.]

1. Necessary allegations. R. S. 1881, § 5237, and authorities cited in note; *Steele v. Murray*, 1 Blkf. 178; *Test v. Devers*, 2 Blkf. 80; *Boxley v. Collins*, 4 Blkf. 320; *Barton v. Osborn*, 6 Blkf. 145; *Klingensmith v. Faulkner*, 84 Ind. 331; *Schroeder's McDonald*, 480; 2 *Estee's Pl. and Prac.* 507 et seq.

2. What will constitute a forcible entry or detainer. *Evill v. Conwell*, 2 Blkf. 133; *Bell v. Longworth*, 6 Ind. 273; *Archey v. Knight*, 61 Ind. 311; *Tibbetts v. O'Connell*, 66 Ind. 171; *Barton v. Osborn*, 6 Blkf. 145.

3. Jurisdiction. Formerly, jurisdiction of this class of cases belonged exclusively to justices of the peace. *Poffenberger v. Blackstone*, 57 Ind. 288.

But the action may now be brought either before a justice of the peace or in the circuit court. *R. S.* 1881, § 5226; *Short v. Bridwell*, 15 Ind. 211; *O'Connell v. Gillespie*, 17 Ind. 459; *Sturgeon v. Hitchins*, 22 Ind. 107; *Kiphart v. Brenneman*, 25 Ind. 153; *Wiltz v. Haynes*, 43 Ind. 470; *Poffenberger v. Blackstone*, 57 Ind. 288.

264.—To forfeit lease and recover possession.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, by lease, duly executed by plaintiff and defendant, a copy of which is filed herewith, and made a part of this complaint, leased to defendant, for the term of — from that date, the following real estate in the county of —, State of Indiana: [*describe it.*]

That, by the terms of said lease, the defendant covenanted to pay, as rent for said real estate, — dollars per annum, payable — dollars on the — day of each and every month, and that if any of said installments of rent, or any part thereof, should not be promptly paid when due, said lease should thereby become void and be forfeited, and that it should be lawful for plaintiff to re-enter and take possession of the same.

That the defendant thereupon entered on said premises under said lease.

That defendant failed and neglected to pay the installment of rent coming due on the — day of —, 18—, and on said day the plaintiff, just before sunset, duly demanded payment of — dollars, the amount of said installment of rent, on the premises, at the front door of the dwelling thereon; but defendant failed and refused to pay the same, or any part thereof, and the same remains due and wholly unpaid.

That, by the terms of said lease and the failure of defendant to pay said rent on demand, said tenancy has terminated, but the defendant has, since the — day of —, 18—, unlawfully held over and still retains possession of said premises, whereby plaintiff has been damaged in the sum of — dollars.

Wherefore, plaintiff demands judgment for the possession of said real estate and — dollars damages.

[*Copy of lease.*]

[*Signature.*]

1. Demand for rent. The failure to pay rent does not forfeit the lease. There must be a demand, on the premises, or other place if designated in the lease, just before sunset of the day it becomes due, and a failure, upon such demand, to pay. *Philips v. Doe*, 3 Ind. 132; *Bacon v. The Western Furniture Co.*, 53 Ind. 229; *Jenkins v. Jenkins*, 63 Ind. 415.

So, where the covenant is to pay taxes, or the like, a demand or request to pay is necessary. *Meni v. Rathbone*, 21 Ind. 454.

See also, as to forfeitures generally, *Lindsey v. Lindsey*, 45 Ind. 552; *Schuff v. Ransom*, 79 Ind. 458; *Cory v. Cory*, 86 Ind. 567.

There can be no forfeiture for non-payment of rent unless it is so expressed in the lease or agreement. *Brown v. Bragg*, 22 Ind. 122.

LIBEL AND SLANDER.

SECTION LI.

LIBEL.

265.—Charge libelous on its face.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendants [composed and] published of and concerning the plaintiff in a certain newspaper called — [or, in a hand-bill which he circulated (posted) at —], a certain false and malicious libel, containing in one part, among other things, the false, malicious, and defamatory matter following: [*set it out verbatim, with innuendoes, if necessary*], and in another part of said libel the false, malicious, and defamatory matter following: [*set it out verbatim.*]

Whereby plaintiff was injured in his reputation, to his damage — dollars, for which he demands judgment. [Signature.]

266.—Libel requiring inducement—Indirect charge of larceny.

[*Caption and commencement.*]

That before the committing of the grievances hereinafter mentioned, a certain horse of defendants had been feloniously stolen by some person or persons [or state that, the defendant was possessed of a horse and

X Suff. under OK Stat. to state generally what defamatory matter was. OK Stat Sec 259

had asserted that his horse had been feloniously stolen; or, it had been asserted that his said horse had been feloniously stolen].

That the defendant, knowing the premises, on the — day of —, 18—, falsely and maliciously composed and published, and caused to be published, a certain malicious libel, containing, among other things, the false, malicious, and libelous matters following, of the plaintiff, and concerning the said horse and the said [supposed] stealing thereof; that is to say, he [*meaning the plaintiff*] is the person who took my [*meaning defendant's*] horse [*meaning the horse herein first mentioned*] from the field.

Thereby meaning that the plaintiff had feloniously stolen, taken, and carried away the said horse.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

267.—Libel by effigy.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, contriving to injure plaintiff in his reputation, and to bring him into public ridicule and contempt, did wrongfully and maliciously make an effigy or figure, intended to represent plaintiff, and hung the same up upon a gibbet in a public street of the city of —, in presence and view of divers persons there assembled.

Whereby plaintiff has been greatly injured in his reputation, to his damage — dollars, for which he demands judgment.

[Signature.]

1. What will constitute a libel. Armentrout v. Moranda, 8 Blkf. 426; Johnson v. Stebbins, 5 Ind. 364; Heilman v. Shanklin, 60 Ind. 424; Gabe v. McGinnis, 68 Ind. 538; Bain v. Myrick, 88 Ind. 137; Over v. Hildebrand, 92 Ind. 19; Young v. Clegg, 93 Ind. 371; Hake v. Brames, 95 Ind. 161; Hartford v. The State, 96 Ind. 461; Crocker v. Hadley, 102 Ind. 416.

2. Necessary allegations. Johnson v. Stebbins, 5 Ind. 364; Gabe v. McGinnis, 68 Ind. 538; De Armond v. Armstrong, 37 Ind. 35; The Indianapolis Sun Co. v. Howell, 53 Ind. 527; Spaits v. Poundstone, 87 Ind. 522; Coombs v. Rose, 8 Blkf. 155; Downey v. Dillon, 52 Ind. 442; Bain v. Myrick, 88 Ind. 137; Young v. Clegg, 93 Ind. 371. See SLANDER, post, pp 198-202.

SECTION LII.

SLANDER.

268.—Where inducement is not necessary.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, in a certain discourse, which defendant then had in the presence and hearing of divers persons, falsely and maliciously spoke and published, of and concerning plaintiff, the following false and malicious words: [*set them out.*]

By means whereof plaintiff has been injured in his reputation, to his damage — dollars, for which he demands judgment.

[*Signature.*]

269.—Charging perjury directly.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, in a certain discourse, which the defendant then had in the presence and hearing of divers persons, falsely and maliciously spoke and published, of and concerning the plaintiff, the false and malicious words following: You [*meaning plaintiff*] perjured yourself.

Whereby plaintiff has been injured in his good name and reputation, to his damage — dollars, for which he demands judgment.

[*Signature.*]

270.—Charge of perjury requiring colloquium.

[*Caption and commencement.*]

That before the committing of the grievances hereinafter mentioned, an action pending in the — Circuit Court [*or, before —, a justice of the peace in and for — township, — county, State of Indiana, said justice then and there having jurisdiction of the subject-matter and parties*], wherein one — was plaintiff and one — was defendant, was tried in said court, and on such trial this plaintiff was examined on oath, and gave his evidence as a witness called on behalf of the plaintiff [*defendant*] therein.

That the defendant, knowing the premises and intending to injure the plaintiff and cause it to be believed that he had committed perjury, in a certain discourse which he had in the presence and hearing

of divers persons on the — day of —, 18—, maliciously spoke and published, of and concerning the plaintiff, and of and concerning said trial and the testimony of plaintiff as a witness thereat, the false and malicious words following: 1. He [*meaning plaintiff*] swore to a lie against — [*meaning defendant (plaintiff)*] in the aforesaid action. 2. But for his [*meaning plaintiff's*] false swearing [*meaning plaintiff's testimony in said action*], — [*meaning said defendant (plaintiff)*] would not have lost his suit.

Thereby charging and intending to charge that plaintiff had been guilty of the crime of willful and corrupt perjury.

Whereby plaintiff has been injured in his good name and reputation, to his damage — dollars, for which he demands judgment.

[*Signature.*]

271.—Charge in a foreign language.

[*Caption and commencement.*]

That on the — day of —, 18—, in a certain discourse, then had by the defendant, in the presence and hearing of divers persons, who understood the [German] language, defendant maliciously spoke and published of and concerning the plaintiff the false and malicious words following in the [German] language, to wit: [*set out the charge in the original*], which said words signify and were understood by said persons to mean, in English, as follows, to wit: [*set out the same in English, with all necessary innuendoes*], and said [German] words were so understood by said persons, in whose hearing and presence they were spoken.

Whereby plaintiff was injured in his reputation, to his damage — dollars, for which he demands judgment.

[*Signature.*]

272.—Injury to vocation.

[*Caption and commencement.*]

That at the time of the committing of the grievances hereinafter mentioned plaintiff was carrying on the trade [business] of a —.

That on the — day of —, 18—, defendant, in the presence and hearing of a number of persons, spoke of and concerning the plaintiff and his trade [business], as such —, the false and malicious words following: He [*meaning plaintiff*] is a swindler. He [*meaning plaintiff*] delivers goods worse by twenty-five per cent than his customers bargain for.

By reason of which grievance plaintiff has been injured in his reputation and trade, and divers persons, particularly —, who before

dealt with plaintiff in his said trade [business], has since then, and by reason thereof, refused to have dealings with him, and plaintiff has thereby lost divers gains, which would otherwise have accrued to him in his said trade [business], to his damage — dollars, and has been injured in his reputation and credit to his damage — dollars.

Wherefore, he demands judgment for — dollars.

[Signature.]

273.—Averments of special damages.

LOSS OF EMPLOYMENT.—That, by reason of said slander, one —, who before was about to employ, and would have employed, plaintiff, at his —, at certain wages, refused to take plaintiff into his service—and plaintiff was unable to obtain employment for — weeks there, after.

LOSS OF SITUATION.—That, by reason of said slander, one —, in whose employment plaintiff was as a —, for wages, discharged plaintiff from his employ [refused to continue plaintiff in his employ], whereby plaintiff lost — dollars, which otherwise would have accrued to him.

LOSS OF CREDIT.—That, by reason of said slander, divers persons, particularly —, who would otherwise have sold plaintiff certain goods, to wit: [*describe them*], on credit, refused so to do, whereby plaintiff lost certain profits which would have accrued to him, to his damage — dollars.

1. What words actionable. Hays v. Allen, 3 Blkf. 408; Ricket v. Stanley, 6 Blkf. 169; Coombs v. Rose, 8 Blkf. 155; Worth v. Butler, 7 Blkf. 251; Jones v. Chapman, 5 Blkf. 88; Shields v. Cunningham, 1 Blkf. 86; Drummond v. Leslie, 5 Blkf. 453; Henry v. Hamilton, 7 Blkf. 506; Wyant v. Smith, 5 Blkf. 293; Beckett v. Sterrett, 4 Blkf. 499, Wilcox v. Edwards, 5 Blkf. 183; Alley v. Neely, 5 Blkf. 200; Hays v. Mitchell, 7 Blkf. 117; Atkinson v. Reding, 5 Blkf. 39; Creelman v. Marks, 7 Blkf. 281; Abrams v. Smith, 8 Blkf. 95; Clark v. Ellis, 2 Blkf. 8; Craig v. Brown, 5 Blkf. 44; Miles v. Vanhorn, 17 Ind. 245; Ausman v. Veal, 10 Ind. 355; Nichols v. Guy, 2 Ind. 82; Harper v. Delp, 3 Ind. 225; Prichard v. Lloyd, 2 Ind. 154; Dodge v. Lacey, 2 Ind. 212; Hutts v. Hutts, 51 Ind. 581; Downey v. Dillon, 52 Ind. 442; Acker v. McCullough, 50 Ind. 447; Abshire v. Cline, 3 Ind. 115; Guard v. Risk, 11 Ind. 156; O'Conner v. O'Conner, 24 Ind. 218; Keeshing v. McCall, 36 Ind. 321; Hotchkiss v. Olmstead, 37 Ind. 74; Brickensstaff v. Perrin, 27 Ind. 527; Kelley v. Dillon, 5 Ind. 426; Weston v. Lumley, 33 Ind. 486; Rodgers v. Lacey, 23 Ind. 507; Linck v. Kelley, 25 Ind. 278; Hutts v. Hutts, 62 Ind. 214; Wilson v. Barnett, 45 Ind. 163; Waugh v. Waugh, 47 Ind. 580; Emmerson v. Marvel, 55 Ind. 265; Rodebaugh v. Hollingsworth, 6 Ind. 339; Reynolds v. Ross, 42 Ind. 387; Schurick v. Kollman, 50 Ind. 336; Porter v. Choen, 60 Ind. 338; Hutchinson v. Lewis, 75 Ind. 55; Works v. Stevens, 76 Ind. 181; Logan v. Logan, 77 Ind. 558; McFadin v. David, 78 Ind.

445; *Wilson v. McCrory*, 86 Ind. 170; *Seller v. Jenkins*, 97 Ind. 430; *Shinloub v. Ammerman*, 7 Ind. 347; *Dukes v. Clark*, 2 Blkf. 20; *Proctor v. Owens*, 18 Ind. 21.

2. Necessary allegations. (a.) *Generally.* *Rodebaugh v. Hollingsworth*, 6 Ind. 339; *Shinloub v. Ammerman*, 7 Ind. 347; *Guard v. Risk*, 11 Ind. 156; *Worth v. Butler*, 7 Blkf. 251; *Emmerson v. Marvel*, 55 Ind. 265; *Watts v. Morgan*, 50 Ind. 318; *Mann v. Hauts*, 40 Ind. 122; *Throgmorton v. Davis*, 3 Blkf. 383; *Yeates v. Reed*, 4 Blkf. 463; *Hutchinson v. Lewis*, 75 Ind. 55; *Marks v. Jacobs*, 76 Ind. 216; *Wilson v. McCrory*, 86 Ind. 170; *Spaits v. Poundstone*, 87 Ind. 522.

(b.) *For charge of adultery.* *Lumpkins v. Justice*, 1 Ind. 557; *Huddleson v. Swope*, 71 Ind. 430.

(c.) *Incest.* *Lumpkins v. Justice*, 1 Ind. 557; *Griggs v. Vickroy*, 12 Ind. 549; *Millison v. Sutton*, 1 Ind. 508; *Dukes v. Clark*, 2 Blkf. 20.

(d.) *Fornication.* *Abshire v. Cline*, 3 Ind. 115; *Millison v. Sutton*, 1 Ind. 508; *Proctor v. Owens*, 18 Ind. 21; *Emmerson v. Marvel*, 55 Ind. 265; *Dukes v. Clark*, 2 Blkf. 20.

(e.) *Embezzlement.* *Taylor v. Short*, 40 Ind. 506.

(f.) *Murder.* *Jones v. Diver*, 22 Ind. 184; *McFadin v. David*, 78 Ind. 445.

(g.) *Perjury.* *Butler v. Gutheny*, 1 Blkf. 496; *Clark v. Ellis*, 2 Blkf. 8; *Shellenbarger v. Norris*, 2 Ind. 285; *Wilson v. Harding*, 2 Blkf. 241; *Whitsel v. Lennen*, 13 Ind. 535; *Cummins v. Butler*, 3 Blkf. 190; *Dorsett v. Adams*, 50 Ind. 129; *Downey v. Dillon*, 52 Ind. 442; *Hutts v. Hutts*, 62 Ind. 214; *Dean v. Miller*, 66 Ind. 440.

(h.) *Larceny.* *Keeshing v. McCall*, 36 Ind. 321; *Durrah v. Stillwell*, 59 Ind. 139; *Wilson v. McCrory*, 86 Ind. 170.

(i.) *Charge in foreign language.* *Hickley v. Grosjean*, 6 Blkf. 351; *Kerschbaugher v. Slusser*, 12 Ind. 453.

3. Inducement, innuendo, colloquium—when necessary, and effect of. *Cummins v. Butler*, 3 Blkf. 190; *Hays v. Mitchell*, 7 Blkf. 117; *Stucker v. Davis*, 8 Blkf. 414; *Dodge v. Lacey*, 2 Ind. 212; *Harper v. Delp*, 3 Ind. 225; *Rodebaugh v. Hollingsworth*, 6 Ind. 339; *Ward v. Calyhan*, 30 Ind. 395; *Hart v. Coy*, 40 Ind. 553; *Keeshing v. McCall*, 36 Ind. 321; *Jones v. Diver*, 22 Ind. 184; *Shinloub v. Ammerman*, 7 Ind. 347; *Dorsett v. Adams*, 50 Ind. 129; *Schurick v. Kollman*, 50 Ind. 336; *Watts v. Morgan*, 50 Ind. 318; *Hutts v. Hutts*, 51 Ind. 581; *Emmerson v. Marvel*, 55 Ind. 265; *Huddleson v. Swope*, 71 Ind. 430; *Lipprant v. Lipprant*, 52 Ind. 273; *McFadin v. David*, 78 Ind. 445; *Branstetter v. Donough*, 81 Ind. 527; *Bain v. Myrick*, 88 Ind. 137; *Seller v. Jenkins*, 97 Ind. 430; *Linnville v. Earlywine*, 4 Blkf. 469.

4. Where action must be commenced. The action for libel or slander is transitory and must be brought where the defendant resides. *Linnville v. Earlywine*, 4 Blkf. 469; *Emmerson v. Marvel*, 55 Ind. 265; *Offut v. Earlywine*, 4 Blkf. 460.

5. Special damages, when must be alleged. *Guard v. Risk*, 11 Ind. 156.

6. Married woman may sue alone. Formerly a married woman could not sue alone for slander, but must join her husband; but it is otherwise under the present statute, which expressly authorizes her to sue alone. *R. S. 1881, § 5131*; ante, vol. 1, § 75; *Logan v. Logan*, 77 Ind. 558.

274.—Slander of title to real estate.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, being the owner in fee of the following described real estate in the county of —, State of Indiana [*describe it*], offered the same for sale at public auction.

That the defendant contriving it to be suspected that plaintiff did not own said property, and to prevent his sale of the same, did, at said public auction, falsely and maliciously, and without probable cause, in the presence of — [*or, of divers persons*], who was [*were*] there for the purpose of bidding on said property, speak of and concerning said property and the plaintiff's title thereto the false and malicious words following: [*state what, e. g., this property belongs to me, and one who buys it buys a lawsuit.*]

By reason whereof, said — [*or, divers persons, and in particular (name them)*], who were present at said auction for the purpose of buying said property] were prevented from bidding, and refused, and still refuse, to purchase said property.

Whereby plaintiff is unable to sell the same, and incurred — dollars expenses in having said auction, and has been otherwise injured, to his damage in the sum of — dollars, for which he asks judgment. [*Signature.*]

SECTION LIII.

LIENS.

275.—To marshal liens and sell.

[*Caption and commencement.*]

That on the — day of —, 18—, by the consideration of the — Circuit Court, plaintiff recovered a judgment against the defendant, —, in the sum of — dollars, and also — dollars, his costs, which judgment is wholly unpaid and unsatisfied.

That on the — day of —, 18—, an execution was duly issued on said judgment, and for want of goods and chattels whereon to levy was on said day duly levied on the following described real estate [*describe it*], which levy still subsists.

That the defendants, — and —, claim to have some lien or right in said premises, by reason of which claims plaintiff is unable to effect a sale of said premises under said execution.

Wherefore, plaintiff asks that said claimants be compelled to set up their claims, if any they have, in said property, or be forever barred, and that the court will adjust the priorities thereof and of plaintiff's said lien, and that said real estate may be ordered sold and the proceeds distributed among the claimants according to their respective priorities as the same shall be settled by the court, and for all other proper relief.

[Signature.]

1. Judgment not a lien on equitable interest in real estate. *Terrel v. Prestel*, 68 Ind. 86; *Modesett v. Johnson*, 2 Blkf. 431; *Doe v. Hays*, 1 Ind. 247; *Russell v. Hueston*, 5 Ind. 180; *Gentry v. Allison*, 20 Ind. 481; *Jeffries v. Sherburn*, 21 Ind. 112.

As to the liens of executions and judgments generally, see ante, vol. 1, § 1034; vol. 2, §§ 1150, 1156.

2. Priority of liens. See ante, vol. 1, §§ 1034-1037; *Merrit v. Richey*, 97 Ind. 236; *Trentman v. Eldridge*, 98 Ind. 525.

276.—Mechanic's lien—For personal judgment, and to enforce lien.

[Caption and commencement.]

That on the — day of —, 18—, the defendant was, and still is, the owner in fee of [*describe the real estate particularly*].

That on the — day of —, 18—, plaintiff and defendant entered into a contract by which plaintiff agreed to furnish the material to be used in the erection of a dwelling-house [*or, to furnish an engine and other machinery for a flouring mill situate (to be erected)*] thereon.

That, in pursuance of said agreement, plaintiff furnished material for said building of the value of — dollars, a bill of particulars of which is filed herewith, and made a part of this complaint [*or, furnished (describe the machinery) for said mill of the value of — dollars*].

That said material was used by defendant in the construction of said dwelling-house which was completed on the — day of —, 18—.

[*Or, said machinery was placed in and is being used by defendant in said mill.*]

That on the — day of —, 18—, less than sixty days after said material [*machinery*] was furnished, the plaintiff filed in the recorder's office of said county, a notice of his intention to hold a lien on said property for the amount of his said claim, specifically setting forth the amount claimed, and a description of said real estate, a copy of which is filed herewith, and made a part of this complaint; and the same

was, on said day, duly recorded in Miscellaneous Record Book, No. —, p. —.

That said sum of — dollars is now due and wholly unpaid.

Wherefore, the plaintiff demands judgment for — dollars, and for the enforcement of said lien and the sale of said property for the satisfaction thereof, and for all other proper relief. [Signature.]

[*Bill of particulars and notice.*]

277.—By sub-contractor against owner for personal judgment, and to enforce lien.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant was, and still is, the owner in fee of the following real estate in the county of —, State of Indiana [*describe it*].

That on said day the defendant contracted with one —, to erect for him a dwelling-house thereon, for which he agreed to pay him the sum of — dollars, said — to furnish all necessary material.

That on the — day of —, 18—, said — and plaintiff entered into a contract, by which plaintiff was to furnish the material for the wood-work of said house, to be used by said — in its construction.

That on the — day of —, 18—, in pursuance of said agreement, the plaintiff furnished lumber and other material for the construction of said building, of the value of — dollars, a bill of particulars of which is filed herewith, and made a part of this complaint, which material was used by said — in the construction thereof.

That before [*or, at the time of*] furnishing said material, the plaintiff notified the defendant that he was furnishing the same to said — to be used in said building.

That on the — day of —, 18—, the plaintiff gave defendant written notice, particularly setting forth the amount of his claim and the material furnished to said —; that the said — was indebted to him therefor, and that plaintiff would hold the defendant responsible for the same, a copy of which notice is filed herewith, and made a part of this complaint.

That at the time plaintiff so notified the defendant he was indebted to said — on his contract for the construction of said building in the sum of — dollars.

That on the — day of —, 18—, and less than sixty days after said material was furnished, the plaintiff filed in the office of the recorder of said county his written notice, a copy of which is filed herewith, and made a part of this complaint, of his intention to hold a

lien on said property for the amount of his said claim, specifically setting forth therein the amount claimed and giving a substantial description of said real estate on which said house was situate, which notice was on said day duly recorded in Miscellaneous Record Book —, page —, in said office.

That the plaintiff has been compelled to employ an attorney to bring and prosecute this action, and a reasonable fee for his services is — dollars.

That there is now due plaintiff on said account — dollars, and said sum of — dollars for attorney's fees, all of which remains wholly unpaid.

Wherefore, the plaintiff demands judgment for — dollars, due on said account, and — dollars for attorney's fees, and prays the court that said lien be enforced and said property sold for the satisfaction thereof, and for all other proper relief. [Signature.]

[Bill of particulars and notices.]

1. Necessary allegations. (a.) *As to notice.* R. S. 1881, §§ 5295, 5296; Sup. R. S. 1881, §§ 6953, 6955, 6959; ante, vol. 1, §§ 298–302, 393; *The School Township of Princeton v. Gebhart*, 61 Ind. 187; *Irvin v. The City of Crawfordsville*, 58 Ind. 492; *Crawford v. Crockett*, 55 Ind. 220; *The City of Crawfordsville v. Brundage*, 57 Ind. 262; *Lawton v. Case*, 73 Ind. 60; *City of Crawfordsville v. Boots*, 76 Ind. 32; *McCarty v. Burnet*, 84 Ind. 23; *Newcomer v. Hutchins*, 96 Ind. 119.

(b.) *Description of premises:* *The City of Crawfordsville v. Barr*, 65 Ind. 367.

(c.) *That material was furnished for and used in the building.* *The City of Crawfordsville v. Barr*, 45 Ind. 258; *Hill v. Braden*, 54 Ind. 72; *Hill v. Ryan*, 54 Ind. 118; *Crawford v. Crockett*, 55 Ind. 220; *Talbott v. Goddard*, 55 Ind. 496; *The City of Crawfordsville v. Brundage*, 57 Ind. 262; *Miller v. Roseboom*, 59 Ind. 345; *Lawton v. Case*, 73 Ind. 60; *Thomas v. Kiblinger*, 77 Ind. 85.

(d.) *And to one authorized to erect the same.* *Ogg v. Tate*, 52 Ind. 159.

(e.) *When personal judgment against owner is asked.* *Lawton v. Case*, 73 Ind. 60.

(f.) *Ownership of property by defendant.* *Lawton v. Case*, 73 Ind. 60; *McCarty v. Burnet*, 84 Ind. 23; *Dalton v. Tindolph*, 87 Ind. 490.

2. Lien for repairs. Formerly the lien was only given for materials furnished for the construction of *new buildings*, or to a contract entered into with the owner of any building for repairs. 2 R. S. 1876, p. 267, § 648; *Woodward v. McLaren*, 100 Ind. 586.

But the present statute makes no such distinction, and a lien against the property may be enforced for materials furnished for repairs the same as if used to construct a new building. Sup. R. S. 1881, § 6959; R. S. 1881, § 5295.

3. Can not be enforced against public property. *Board of Commrs. of Pike Co. v. Norrington*, 82 Ind. 190; *Board of Commrs. of Parke Co. v.*

O'Conner, 86 Ind. 531; *Secrist v. The Board of Commrs. of Delaware Co.*, 100 Ind. 59.

4. Priority of lien. *Mark v. Murphy*, 76 Ind. 534.

5. Parties. The statute provides that all persons whose liens are recorded as therein provided, may be made parties. R. S. 1881, § 5298; Sup. R. S. 1881, § 6957.

And the owner of the property at the time the suit is commenced is a necessary party. *Marvin v. Taylor*, 27 Ind. 73; *Kellenberger v. Boyer*, 37 Ind. 188.

For forms of notice, see NOTICE, post, pp. 608-609.

See ANSWER, post, pp. 384-385.

278.—On vendor's lien and for personal judgment against vendee.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff sold and conveyed to the defendant the following real estate in the county of —, State of Indiana [*describe it*], for the sum of — dollars, of which one-third was paid in hand and the balance made payable in equal installments of — dollars each, in one and two years from said day, for which the defendant executed to plaintiff his two promissory notes, bearing interest at the rate of — per cent per annum, copies of which are filed herewith, marked "A" and "B" respectively, and made parts of this complaint.

That said notes are now due and remain wholly unpaid, and the amount due thereon is a lien upon said real estate.

That said defendant has no other property subject to execution.

Wherefore, plaintiff demands judgment for — dollars, and prays the court that the same be declared a lien upon said real estate, and that the same, or so much as may be necessary for that purpose, be sold to satisfy plaintiff's debt and costs, and for all other proper relief.

[*Copy of notes marked A and B.*]

[*Signature.*]

279.—To enforce vendor's lien against subsequent purchasers and lien-holders and for personal judgment against purchaser assuming debt.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, being the owner in fee-simple thereof, sold and conveyed to defendant, A. B., the following real estate in the county of —, State of Indiana: [*describe it*], for — dollars, of which — dollars was paid in hand and the balance made payable in equal installments of — dollars each, in one, two, and three years respectively from said date, without security.

That the defendant, C. D., has since purchased from said A. B. the south one-half of said premises, and taken a conveyance from him therefor, and in consideration of said conveyance assumed and agreed to pay the plaintiff the said sum of — dollars, due one year after the date of his conveyance to said A. B.

That the defendant, E. F., has since purchased the north half of said premises from said A. B., with full notice and knowledge that said balance of purchase-money had not been paid, and taken a conveyance thereof.

That the defendant, G. H., holds a mortgage on said real estate for — dollars, given by said A. B., but the same was taken by said defendant with full knowledge that said balance of purchase-money due the plaintiff from said A. B. had not been paid.

That the defendant, I. J., claims some interest in or lien on said real estate, the nature of which is to plaintiff unknown, but plaintiff says the same is subordinate to his lien, and asks that he be compelled to set the same up, or that the same be barred.

That said sum of — dollars is still due the plaintiff, and wholly unpaid.

That said A. B. has no property subject to execution out of which plaintiff can make his claim or any part of it.

Wherefore, plaintiff demands judgment against the defendant, C. D., for said sum of — dollars, assumed and agreed to be paid by him; that the whole sum due plaintiff be declared a lien on said real estate, paramount to any claims of the defendants, and that the same be sold and the proceeds applied to the payment of plaintiff's claim and costs, and for all other proper relief. [Signature.]

1. Necessary allegations. (a.) *That defendant has no personal property subject to execution.* This allegation is not necessary to the sufficiency of the complaint. *Evans v. Feeny*, 81 Ind. 532; *Lord v. Wilcox*, 99 Ind. 491. But if it is not made, the plaintiff is not entitled to a judgment for the sale of the property in the first instance. The judgment must direct that the personal property of the defendant subject to execution be first exhausted, and that upon failure to realize the amount due the specific property be sold to satisfy the lien. *Ante*, vol. 1, § 1010; *Stelzer v. La Rose*, 79 Ind. 435; *Nutter v. Fouch*, 86 Ind. 451; *Citizens' State Bank v. Adams*, 91 Ind. 280; *Lord v. Wilcox*, 99 Ind. 491. See JUDGMENTS AND DECREES, pp. 457, 458.

And where there has been a sale of the property by the vendee it must be shown that he has no property, real or personal, against which his personal obligation to pay the debt can be enforced, although the purchaser took with notice of the lien. *Ante*, vol. 1, § 1010; *McCauley v. Holtz*, 62 Ind. 205.

(b.) *Notice by subsequent purchaser or incumbrancer.* Where the action is to enforce the lien as against a purchaser from the vendee or incumbrancer, it

must be shown that he took with notice. The burden of showing the notice of such facts as should put him on inquiry is upon the plaintiff. *McCarty v. Pruett*, 4 Ind. 226; *Gaar v. Millikan*, 68 Ind. 208; *Richards v. McPherson*, 74 Ind. 158.

But it is otherwise where the vendor still holds the legal title, *e. g.*, where he has given a bond for a deed. *Amory v. Reilly*, 9 Ind. 490.

So where the grantee of the vendee is a mere volunteer no notice need be shown. *Retry v. Ambrosher*, 100 Ind. 510.

And where a part of the purchase-money to be paid by such purchaser is unpaid the lien may be enforced against the land in his hands to the extent of the sum unpaid. *Higgins v. Kendall*, 73 Ind. 522.

If the deed reserves a lien or recites that the purchase-money is unpaid this is notice sufficient. *Sample v. Cochran*, 84 Ind. 594; *Croskey v. Chapman*, 26 Ind. 338.

Although not recorded, where purchaser claims through it. *Wiseman v. Hutchinson*, 20 Ind. 40.

2. Priority of liens. *Fisher v. Johnson*, 5 Ind. 492; *Aldridge v. Dunn*, 7 Blkf. 249.

3. Liability of purchaser who assumes to pay the incumbrance. *Ante*, vol. 1, § 142.

4. Parties. *Merritt v. Wells*, 18 Ind. 171; *ante*, vol. 1, § 41.

5. Assignment of note passes lien. *Ante*, vol. 1, § 41.

6. Waiver. See *REPLY*, p. 413.

7. Tender of deed. Where the purchase-money is payable on the making of the deed, or the deed made is so defective as to convey no title, a good and sufficient deed for the property must be tendered. *Overly v. Tipton*, 68 Ind. 410; *Mather v. Scoles*, 35 Ind. 1; *Cole v. Wright*, 50 Ind. 296.

280.—By administrator of vendor against heirs and administrator of vendee.

[Caption and commencement.]

That on the — day of —, 18—, A. B., being the owner thereof, sold and conveyed to C. D., the following real estate in the county of —, State of Indiana [*describe same*], for the sum of — dollars, payable on the — day of —, 18—.

That on the — day of —, 18—, at —, said A. B. departed this life intestate, and thereafter, on the — day of —, 18—, the plaintiff was by the — Circuit Court, duly appointed administrator of his estate, and qualified and entered upon his duties.

That on the — day of —, 18—, at —, said C. D. still being the owner and in possession of said real estate, departed this life intestate, leaving the defendants, E. F. and G. H., his only heirs at law.

That on the — day of —, 18—, the defendant, I. J., was, by

the — Circuit Court, duly appointed administrator of the estate of said C. D., and qualified and entered upon his duties.

That, at the time of his death, said C. D. had no other property subject to execution out of which said claim could be made, and his estate has no other property out of which the same or any part of it can be satisfied.

That there is now due to plaintiff of said purchase-money the sum of — dollars, which remains wholly unpaid.

Wherefore, the plaintiff prays the court that said sum of — dollars be declared to be due him, and a lien upon said real estate, and that the same be sold for the satisfaction of said claim and costs, and for all other proper relief.

[Signature.]

1. Necessary allegations. Lord v. Wilcox, 99 Ind. 491.

2. Parties. The heirs of the grantee are necessary parties and his administrator a proper party to the action. Overly v. Tipton, 68 Ind. 410; Lord v. Wilcox, 99 Ind. 491.

3. Tender of deed, when necessary. Overly v. Tipton, 68 Ind. 410.

SECTION LIV.

LIQUOR LAW.

281.—By wife for unlawful sale to husband.

[Caption and commencement.]

That on the — day of —, 18—, the defendant was duly licensed, by the board of commissioners of — county, Indiana, to sell spirituous, vinous, and malt liquors, in less quantities than a quart at a time, at —, in — township of said county.

That one — was, on the — day of —, 18—, and still is, the husband of the plaintiff.

That on the — day of —, 18—, the defendant, acting under said license, unlawfully sold to said — intoxicating liquors, the said — being at the time in a state of intoxication.

[Or say: That said — was, on the — day of —, 18—, and had been long prior thereto, in the habit of being intoxicated.]

That plaintiff, being a citizen of said township, on the — day of —, 18—, duly notified the defendant that said —, who resided in said township, was a person in the habit of being intoxicated.

That thereafter, on the — day of —, 18—, the defendant unlawfully furnished and sold to said — intoxicating liquors.]

That the defendant [disregarding said notice] did [thereafter], to wit, on the — day of —, 18—, and at divers other times between that time and the bringing of this action [and while said notice was in full force], willfully, knowingly, and unlawfully, sell and furnish intoxicating liquors to said —, and caused him to continue in [become and continue in] a state of intoxication.

That said — was a —, and when not intoxicated was energetic and industrious, and earned about — dollars per month, on which earnings plaintiff was dependent for her means of support, but in consequence of said intoxication, so caused by the defendant, became diseased and crazed, neglected his business, squandered his money and time in carousing and drinking, and failed to provide a subsistence for plaintiff, and plaintiff was compelled to nurse and take care of him, and he became permanently debilitated in body and mind, and became unable to provide a support for his family.

Whereby plaintiff has been injured, to her damage — dollars, for which she demands judgment. [Signature.]

1. Necessary allegations. *Mitchell v. Ratts*, 57 Ind. 259; *Fountain v. Draper*, 49 Ind. 441; *Schafer v. The State*, 49 Ind. 460; *Barnaby v. Wood*, 50 Ind. 405; *Collier v. Early*, 54 Ind. 559; *Ditton v. Morgan*, 56 Ind. 60; *Walser v. Kerrigan*, 56 Ind. 301; *Schwarm v. Osborn*, 59 Ind. 245; *Engle v. The State*, 97 Ind. 122.

2. Who may sue. *Mitchell v. Ratts*, 57 Ind. 259; *English v. Beard*, 51 Ind. 489; *Horning v. Wendell*, 57 Ind. 171; *Dunlap v. Wagner*, 85 Ind. 529; R. S. 1881, § 5323.

3. Extent of liability—Measure of damages. *Fountain v. Draper*, 49 Ind. 441; *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Backes v. Dant*, 55 Ind. 181; *Koerner v. Oberly*, 56 Ind. 284; *Schafer v. Smith*, 63 Ind. 226; *Dunlap v. Wagner*, 85 Ind. 529.

4. Notice must be given by citizen of township. *Engle v. The State*, 97 Ind. 122.

5. Parties. *English v. Beard*, 51 Ind. 489.

See COMPLAINT ON BONDS AND UNDERTAKINGS, ante, p. 113.

LOSS OF SERVICE.

See CRIM. CON., pp. 141–144; ASSAULT AND BATTERY, p. 28; NEGLIGENCE, p. 243.

SECTION LV.

MALICIOUS PROSECUTIONS AND ACTIONS.

282.—Malicious prosecution.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant maliciously, and without probable cause, caused the plaintiff to be arrested on a warrant and brought before —, a justice of the peace of — township, — county, Indiana, and having jurisdiction in the premises [*or, before the — Circuit Court*], on a charge of —.

That on the — day of —, 18—, the plaintiff was, by the judgment of said justice, duly given and made, acquitted of said offense and discharged.

[*Or, That on a trial of said charge in said — Circuit Court the plaintiff was, by the judgment of said court, acquitted and discharged.*]

[*Or, that on a preliminary examination of plaintiff before said justice, on said charge, he was bound over to appear before the grand jury of said county, at the next term of said court; and at said next term of said court, to wit, on the — day of —, 18—, said grand jury ignored said charge against plaintiff, and refused to find an indictment against him.*]

Whereupon, he was, by order of said court, discharged, and said prosecution is terminated.

That, in consequence of said arrest, [*if any special damages, state them, e. g.,* said charge and arrest were published in several public newspapers by the procurement of defendant, and plaintiff was injured by the premises in his credit and reputation, and lost the following customers in his business (*name them*), (*or, lost a situation as —*)] and incurred an expense of — dollars in costs and counsel fees in defending himself, and — dollars in procuring bail, and was prevented for — days from transacting his business, whereby] plaintiff was damaged — dollars, for which he demands judgment.

[*Signature.*]

283.—Causing plaintiff to be indicted.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, falsely and maliciously, and without probable cause, procured plaintiff to be indicted by the grand jury of the county of —, State of Indiana, for the crime of —, by reason whereof plaintiff was arrested and confined [imprisoned] for — hours, and compelled to give bail to procure his release, and defendant caused said indictment to be prosecuted, and at the trial thereof in the — Circuit Court plaintiff was, on the — day of —, 18—, duly acquitted of said charge [*or*, on the — day of —, 18—, said prosecution was, by the prosecuting attorney, by and with the consent of the court, dismissed], and the plaintiff discharged, and said prosecution is terminated.

By reason whereof, the plaintiff has been greatly injured in his reputation and credit, to his damage — dollars, for which he demands judgment. [*Signature.*]

1. Necessary allegations. Malice, want of probable cause, and the termination of the prosecution in favor of plaintiff must be alleged. *Findley v. Buchanan*, 1 Blkf. 11; *Stancliff v. Palmeter*, 18 Ind. 321; *Hays v. Blizzard*, 30 Ind. 457; *Steel v. Williams*, 18 Ind. 161; *Gorrell v. Snow*, 31 Ind. 215; *McCullough v. Rice*, 59 Ind. 580; *Rustin v. Biddle*, 43 Ind. 515; *Thomas v. Hunter*, 44 Ind. 477; *Schoonover v. Reed*, 66 Ind. 598; *Workman v. Shelly*, 79 Ind. 442; *Bitting v. Ten Eyck*, 82 Ind. 421; *Clegg v. Waterbury*, 88 Ind. 21.

But the facts showing want of probable cause need not be set out. *Benson v. Bacon*, 99 Ind. 156.

As to the particularity required in describing the offense for which the plaintiff was prosecuted, see *Thomas v. Hunter*, 44 Ind. 477.

The complaint need not allege that the defendant *falsely* made the accusation. *Ziegler v. Powell*, 54 Ind. 173; *McCarthy v. Kitchen*, 59 Ind. 500.

Nor is such an allegation equivalent to one of want of probable cause. *Scotten v. Longfellow*, 40 Ind. 23.

As to the manner of stating the damages, see *Schoonover v. Reed*, 66 Ind. 598.

The issuing of a warrant need not be alleged. *Coffey v. Myers*, 84 Ind. 105; *Ruston v. Riddle*, 48 Ind. 515.

2. What will amount to a termination in favor of plaintiff. *Stancliff v. Palmeter*, 18 Ind. 321; *Hays v. Blizzard*, 30 Ind. 457; *Richter v. Koster*, 45 Ind. 440; *Leever v. Hamil*, 57 Ind. 423; *Coffey v. Myers*, 84 Ind. 105; *Clegg v. Waterbury*, 88 Ind. 21.

3. What is probable cause. *Lacy v. Mitchell*, 23 Ind. 67; *Hays v. Blizzard*, 30 Ind. 457; *Lawrence v. Lanning*, 4 Ind. 194; *Richter v. Koster*, 45 Ind. 440; *Galloway v. Stewart*, 49 Ind. 156; *Scotten v. Longfellow*, 40 Ind. 23; *Burgett v. Burgett*, 43 Ind. 78; *Graeter v. Williams*, 55 Ind. 461; *Workman v. Shelly*, 79 Ind. 442; *Bitting v. Ten Eyck*, 92 Ind. 421; *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

284.—Malicious attachment.

[Caption and commencement.]

That on the — day of —, 18—, in an action pending [then commenced] in the — Circuit Court, by the defendant against plaintiff, the defendant falsely, maliciously, and without probable cause, made an affidavit for an attachment, alleging [state the ground of the attachment], and thereupon procured an order of attachment, under which the plaintiff's goods were seized by the sheriff and taken from the possession of plaintiff, and defendant afterward procured an order of said court to sell said goods, and caused the sheriff to sell the same at a great sacrifice. *defendant 760*

That on the — day of —, 18—, it was adjudged by said court that said attachment should be and the same was discharged.

[Allege special damages.] *Laurence v. Hagerman 86 Ill 69. 74. 1 Edgew D 5373.*

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. Necessary allegations. Williams v. Hunter, 14 Am. Dec. 597, 599, and note. Upphouse v. Mundell, 103 Ind. 238.

285.—Malicious prosecution of civil action.

[Caption and commencement.]

That on the — day of —, 18—, the defendant maliciously, and without probable cause, commenced against the plaintiff, in the — Circuit Court, an action for [state the cause of action, e. g., slander].

That on the — day of —, 18—, on the trial of said cause, judgment was rendered for the plaintiff and against the defendant and for costs, and said action was terminated.

That, by reason of the premises, the plaintiff was compelled to and did pay out large sums of money for attorneys' fees, expenses of attending the trial of said cause, and other expenses in making his defense, whereby he has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. Action will lie for maliciously prosecuting a civil action. There are cases holding that the prosecution of a civil action can give no cause of action for damages, but it is held otherwise in this state. Lockenour v. Sides, 57 Ind. 360; Coffey v. Myers, 84 Ind. 105; McCardle v. McGinley, 86 Ind. 538.

2. Measure of damages. Lackenour v. Sides, 57 Ind. 360; McCardle v. McGinley, 86 Ind. 538.

3. Maliciously procuring search-warrant. As to the necessary allegations in a complaint for maliciously procuring a search-warrant, see Carey v. Sheets, 67 Ind. 375.

Evidence of what occurred prior to appearance before the judge, admitted 7 Colo p 555

MALPRACTICE.

SECTION LVI.

BY ATTORNEY AT LAW.

286.—In the prosecution of an action.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff employed the defendant, who was, and still is, an attorney at law, duly authorized to practice in all of the courts of this state, for a compensation to be paid him therefor [*if the sum was agreed on, state it*], and defendant accepted said employment, to prosecute with due diligence and skill, as attorney, an action in the — Circuit Court, on behalf of this plaintiff, against one — for the recovery of — dollars.

That defendant could, by the exercise of due diligence and skill, have obtained final judgment for plaintiff * before the — day of —, 18—, but he so negligently and unskillfully conducted said action that he did not obtain judgment for plaintiff until the — day of —, 18—.

That on said — day of —, 18—, said — was solvent, and a judgment against him for the amount of plaintiff's claim could have been realized from his property, but before the time when judgment was recovered in said action had become wholly insolvent, whereby plaintiff was deprived of the recovery of said money, no part of which has been recovered or paid, and was compelled to pay — dollars as costs in said action, and paid defendant — dollars as fees during said action.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

287.—Same—Judgment against plaintiff.

[*Continue from * in Form 286*]; but the defendant so negligently and unskillfully conducted said action in this [*state in what the negligence consisted*], that on the — day of —, 18—, judgment was rendered against the plaintiff [*or, plaintiff's action was dismissed*], and plaintiff was compelled to pay — dollars as costs, and had paid defendant — dollars as fees through the progress of said case.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

288.—Neglect in defending.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff retained and employed the defendant, who was an attorney at law, duly authorized to practice in all of the courts of this state, for a compensation to be paid him, and defendant accepted said employment, with due diligence and skill to defend as attorney for the plaintiff an action then pending in the — Circuit Court [or, before —, a justice of the peace of — township, in — county], brought by one — to recover — [state the alleged cause of action].

That on the — day of —, 18—, it became the duty of the defendant to file an answer in plaintiff's behalf in said action, but he failed and neglected so to do; and by reason of said negligence judgment was obtained against this plaintiff in the sum of — dollars and — dollars costs, which plaintiff was compelled to pay to said —, to his damage — dollars, for which he demands judgment.

[Signature.]

289.—Neglect in examining title.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff, having made a contract with one —, who claimed to be the owner thereof, for the purchase from him in fee-simple, and without incumbrances, for the sum of — dollars, of the following real estate in the county of —, State of Indiana: [describe it], employed the defendant, who was an attorney at law, to examine the title of said — in said property, and to report the true condition thereof to plaintiff, and to procure a conveyance of the same to plaintiff from said —, in fee-simple, clear of incumbrances, which employment the defendant, in consideration of — dollars, accepted.

That the defendant reported to the plaintiff that the title of said — was in fee-simple and without incumbrance, in reliance on which report the plaintiff was induced to, and did, purchase said land from said —, paying him — dollars therefor.

That said — did not own the fee-simple title or any title to said property [or, said property was subject to incumbrances of record, being — (state them)], of which the plaintiff was ignorant, and which defendant could, by the exercise of proper diligence and

skill, have discovered, and which he failed to discover by omitting to exercise due care and skill.

That on the — day of —, 18—, by reason of said —'s want of title, the plaintiff was evicted therefrom by one —, the true owner [*or*, the plaintiff was, on the — day of —, 18—, compelled to pay the sum of — dollars to procure the release of said incumbrances, to the holders thereof].

That said — has not repaid the plaintiff the amount paid him for said real estate [*or*, on said incumbrances], or any part thereof, and is insolvent.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. Duties and liabilities of attorneys. See ante, vol. 2, § 1341, and cases cited; *Nickless v. Pearson*, 81 Ind. 427; *Jones v. White*, 90 Ind. 255; *Foulks v. Falls*, 91 Ind. 315.

2. Necessary allegations. *Batty v. Fout*, 54 Ind. 482; *Hilligus v. Bender*, 78 Ind. 225; *Nickless v. Pearson*, 81 Ind. 427; *Jones v. White*, 90 Ind. 255.

SECTION LVII.

BY PHYSICIAN OR SURGEON.

290.—Against physician.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, then being a physician, plaintiff employed him as such physician, for a reward, to attend on and administer medicines to and endeavor to cure plaintiff while sick with an illness under which he was then laboring.

That the defendant then accepted and entered upon such employment, but did not use due and proper care or skill in endeavoring to cure plaintiff of said sickness, in this [*state in what the want of skill consisted and the acts of negligence*].

That, by reason thereof, the plaintiff was injured in his health and constitution, suffered great pain, and was unable to attend to his business for — months, and has been greatly injured in health, and was obliged to incur an expense of — dollars in endeavoring to be cured of said sickness, the same having been aggravated and prolonged by said negligence and want of skill of defendant.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

291.—Against surgeon.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff broke and fractured the bones of his right leg, and on said day the defendant, holding himself out as a surgeon, plaintiff employed him, as such surgeon, to set said broken bones in their proper places and to attend on and treat plaintiff until he should be cured.

That the defendant accepted and entered on said employment, but was so negligent and unskillful in setting said bones and attempting to reduce said fracture, and in attending and dressing said leg, in this, [state in what the want of skill and negligence consisted] that [state the consequences].

By reason whereof [state the special damages, and conclude as in preceding form]. [Signature.]

See NEGLIGENCE, p. 250.

1. Duties and liabilities of physicians and surgeons. Long v. Morrison, 14 Ind. 595; Peck v. Martin, 17 Ind. 115; Scudder v. Crossan, 43 Ind. 343; Gramm v. Boener, 56 Ind. 497; Kelsey v. Hay, 84 Ind. 189; Jones v. Angell, 95 Ind. 376.

2. Necessary allegations. Peck v. Martin, 17 Ind. 115; Scudder v. Crossan, 43 Ind. 343; Coon v. Vaughn, 64 Ind. 89; Hoopingarner v. Levy, 77 Ind. 455; Burns v. Barenfield, 84 Ind. 43; Hawley v. Williams, 90 Ind. 160.

3. Who may sue. (a.) For injury resulting in death. See vol. 1, §§ 65, 113, 114.

(b.) For injury to the wife. R. S. 1881, § 5131; ante, vol. 1, §§ 75, 111, 112, 113, 114.

4. Is the action for a tort or on contract?—Election. Ante, vol. 1, § 355; Staley v. Jameson, 46 Ind. 159; Coon v. Vaughn, 64 Ind. 89.

5. Measure of damages. Kelsey v. Hay, 84 Ind. 189.

6. Action does not survive. Boor v. Lowrey, 103 Ind. 468.

SECTION LVIII.

MANDAMUS.

292.—Application for writ to compel auditor of county to issue warrant.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

The State of Indiana on the relation of —	} Mandamus.
—, Auditor of — County, State of Indiana.	

Your petitioner respectfully shows to the court :

That on the — day of —, 18—, the county of — was indebted to the relator in the sum of — dollars.

That on said day, by an order duly made and entered of record, the board of commissioners allowed said claim in full, and ordered that a warrant be issued to the relator therefor.

That the defendant was then, and has ever since been, the auditor of said county.

That on the — day of —, 18—, the relator demanded of the defendant, as such auditor, that he issue to him a warrant on the treasurer of said county for said sum, but the defendant refused, and still refuses, to issue the same.

That there was then, and is now, in the treasury of said county money liable for the payment of said claim sufficient to satisfy the same in full.

Wherefore, your petitioner prays the court that an alternative writ may issue, commanding the defendant to issue said warrant, or show cause why the same should not be done, and that upon a final hearing a peremptory writ may issue, commanding him to issue and deliver said warrant to the relator.

[Signature.]

[Verification.]

293.—Against city corporation to compel the levy of a tax.

[Caption and commencement as in Form 292.]

That the defendant, —, is the mayor, and the other defendants the members of and constitute the common council of the city of —, a municipal corporation duly organized under the general laws of the

State of Indiana, and having a population of less than forty-five thousand.

That on the — day of —, 18—, the common council of said city, contemplating the building of water-works for the purpose of furnishing the inhabitants thereof with pure water and for fire protection, on the petition of one hundred freeholders and resident taxpayers of said city, submitted the question to the qualified voters of said city at a general election [or, at a special election held for that purpose] on the — day of —, 18—, notice of said election and submission having been given for three weeks successively in the —, a newspaper printed and published in said city.

That at said election a majority of all the votes cast upon said question were in favor of the erection of said water-works.

That on the — day of —, 18—, said common council decided, by ordinance, to erect said water-works for said purposes.

That on the — day of —, 18—, said common council, by a vote of two-thirds of the members, duly issued the bonds of said city, — in number, of the denomination of — dollars each, payable — years after date, bearing interest at — per cent per annum, payable annually.

That upon a sale of said bonds on the — day of —, 18—, the relator became the purchaser thereof at the sum of — cents on the dollar [*not less than ninety-four*].

That the interest on said bonds is payable annually on the — day of — of each year.

That there is now due and unpaid the principal of said bonds and interest thereon in the sum of — dollars, being the interest for — years.

That the said common council has wholly failed, neglected, and refused to levy a tax for the payment of the interest or any part of the principal of said bonds, though frequently requested so to do.

That said city has no property out of which said debt can be made.

Wherefore, the relator prays the court for a writ of mandamus requiring said defendants to levy a tax sufficient to pay the interest now due on said bonds.

[*Signature.*]

[*Verification.*]

1. Necessary allegations. The Mayor, etc., of the City of Kokomo v. The State, 57 Ind. 152; R. S. 1881, §§ 3265, 3283.

294.—To reinstate expelled member of corporation.

[*Caption and commencement as in Form 292.*]

The defendant is a corporation, duly incorporated under the laws of the State of Indiana.

That the relator has been a member of said corporation and in the enjoyment of the rights and privileges of membership for — years last past until the — day of —, 18—, at which date he was removed, against his will, from the privileges of said corporation by a vote of expulsion.

That said expulsion was illegal and contrary to the constitution and by-laws of said corporation, in this [*state how it was illegal*].

The privileges of membership are valuable, in this, that the society has property to the amount of — dollars, and by its constitution each member is entitled to the sum of — dollars per week in case of sickness, and in the event of his death his family are entitled to — dollars. Said payments are made from funds contributed by assessments and dues required of members, to which funds relator has contributed his share as a member.

Wherefore, plaintiff prays that a writ of mandate may issue to said corporation, commanding them to restore the relator to his membership.

[*Signature.*]

[*Verification.*]

1. When and for what purposes writ will issue. Ante, vol. 2, § 1447; *Pfister v. The State*, 82 Ind. 382; *City of Madison v. Smith*, 83 Ind. 502; *State v. Grubb*, 85 Ind. 213; *State v. Slick*, 86 Ind. 501; *Indianapolis v. McAvoy*, 86 Ind. 587; *State v. Cressinger*, 88 Ind. 499; *The State v. Porter*, 89 Ind. 260; *The State v. The First National Bank of Jeffersonville*, 89 Ind. 302; *Hon v. The State*, 89 Ind. 249; *Wolfe v. The State*, 90 Ind. 16; *Borchus v. Saylor*, 90 Ind. 439; *Mount v. The State*, 90 Ind. 29; *The State v. Sherman*, 90 Ind. 123; *The Excelsior, etc., Ass'n v. Riddle*, 91 Ind. 84; *State v. Gray*, 93 Ind. 303; *Pfaff v. The State*, 94 Ind. 529; *Mitchell v. Gregory*, 94 Ind. 363; *Rice v. The State*, 95 Ind. 33; *Harrison School Tp. v. McGregor*, 96 Ind. 185; *Wren v. The City of Indianapolis*, 96 Ind. 206; *State v. Coopridge*, 96 Ind. 279; *State v. Hanna*, 97 Ind. 469; *State v. Snodgrass*, 98 Ind. 546; *Fasnacht v. German, etc., Ass'n*, 99 Ind. 133.

2. Necessary allegations. Ante, vol. 2, § 1448, note n; *State v. Grubb*, 85 Ind. 213; *State v. Slick*, 86 Ind. 501; *Caffyn v. The State*, 91 Ind. 324; *Pfaff v. The State*, 94 Ind. 529; *Rice v. The State*, 95 Ind. 33.

3. Jury trial may be demanded. *The State v. The Burnsville Tp. Co.*, 97 Ind. 416.

SECTION LIX.

MASTER AND SERVANT.

295.—By servant against master for wrongful discharge.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant employed the

plaintiff to work for him as a —, for the term of one year from that date, for which he promised and agreed to pay plaintiff the sum of — dollars per month, payable on the first day of each and every month.

That on the — day of —, 18—, plaintiff entered into said employment, and continued to work until the — day of —, 18—, when the defendant discharged him and refused to allow him to continue in said employment.

That plaintiff performed all of the conditions of said contract on his part to be performed, and was and ever since has been ready and willing to comply with the requirements of the same.

That plaintiff has been unable to obtain employment elsewhere, and has lost the wages, profits, and advantages which he would have derived from said employment, and has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

296.—Breach of contract to serve.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff and defendant mutually agreed that plaintiff should employ the defendant at a monthly compensation of — dollars, and that the defendant should serve the plaintiff as — for the term of — from said date [or, the — day of —, 18—].

That the plaintiff has always been ready and willing to perform his part of said agreement [and on the — day of —, 18—, offered so to do].

That the defendant refused to and has not served the plaintiff as aforesaid [state special damages, if any].

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

MISTAKE.

See REFORMATION, p. 276.

MONEY LENT, PAID, HAD, AND RECEIVED.

SECTION LX.

MONEY LENT.

297.—General form.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, plaintiff, at defendant's request, loaned him — dollars, which defendant promised to repay, with interest, on demand [*or*, on the — day of —, 18—].

That said sum, with the interest, is now due and unpaid [except the sum of — dollars, paid on the — day of —, 18—].

Wherefore, the plaintiff demands judgment for — dollars.

[*Signature.*]

1. Demand, when necessary. Ante, vol. 1, § 260 et seq.

SECTION LXI.

MONEY PAID.

298.—Paid to third person for defendant.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, plaintiff, at defendant's special instance and request, paid to one — — dollars, which the defendant promised to repay, with interest, on the — day of —, 18—.

That said sum is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

299.—By joint debtor, who has paid whole debt, for contribution.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant made and delivered to one — their joint [and several] promissory note in the sum of — dollars, payable to the order of said — in — days after said date.

That on the — day of —, 18— [at the maturity of said note], plaintiff was compelled to pay, and did pay, the same. [*If compelled to pay by action, add: by action brought against him by said —, the holder, in the — Circuit Court.*]

That the defendant is indebted to plaintiff, as his contributive share of said amount, the one-half thereof, to wit, — dollars, which is new due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Signature.*]

See PRINCIPAL AND SURETIES, p. 265.

300.—For money paid on judgment afterward reversed.

[*Caption and commencement.*]

That on the — day of —, 18—, by the consideration of the — Circuit Court, in an action for — [*state what*], the defendant recovered a judgment against the plaintiff for — dollars.

That on the — day of —, 18—, the plaintiff was compelled to pay, and did pay, to defendant — dollars in satisfaction of said judgment.

That such proceedings were afterward had that on the — day of —, 18—, by the consideration of the Supreme Court of the State of Indiana, said judgment was duly reversed.

That on the — day of —, 18—, the plaintiff demanded of the defendant the payment of said amount, which was refused.

That said sum is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Signature.*]

1. Necessary allegations. It is not necessary to allege that payment was coerced by execution. It is enough that a judgment was rendered for the amount. *Lott v. Swezey*, 29 Barb. 87; *Schooley v. Halsey*, 72 N. Y. 578.

The fact that a new trial is ordered, or results from the reversal, does not affect the right to recover back the money. *Sturges v. Allis*, 10 Wend. 354.

A demand for the repayment of the money seems to be necessary. *Schooley v. Halsey*, 72 N. Y. 578.

SECTION LXII.

MONEY HAD AND RECEIVED.

301.—Proceeds of note from broker employed to sell it.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, in consideration of his reasonable charges, agreed with plaintiff to sell [procured to be sold, or discounted] for plaintiff a note belonging to him [made by him], in the sum of — dollars.

That on or about the — day of —, 18—, defendant sold said note [procured said note to be discounted] to [by] one —, and received the avails thereof, being the sum of — dollars.

That defendant's reasonable charges for such services amount to — dollars, and no more.

That on the — day of —, 18—, plaintiff demanded of defendant the amount received on said note, deducting said reasonable charges, which was refused.

That there is now due the plaintiff, and unpaid, the sum of — dollars, for which he demands judgment. [Signature.]

See ACCOUNTING, p. 18 ; AGENTS, pp. 20-23.

302.—Against del credery agent.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff employed the defendant as a del credery agent to sell consignments of grain shipped by plaintiff, defendant agreeing to become responsible to the plaintiff for the price thereof.

That between said date and the — day of —, 18—, plaintiff shipped to defendant, as such agent, large quantities of grain, amounting to — bushels, which was sold by defendant for — dollars [on credit of — days.]

That defendant charged and was paid the commission of a del credery agent [and had no authority to sell said grain on credit].

That on the — day of —, 18—, plaintiff demanded of defendant the payment of said sum of — dollars, but no part thereof has been paid. [If the sale was on credit, and defendant was authorized to sell on credit, add: although said credit expired before the time of said demand].

That said sum of — dollars is now due to plaintiff, and unpaid.
Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

See AGENTS, p. 22; BONDS AND UNDERTAKINGS, p. 86.

303.—For excess of proceeds of collaterals after paying debt.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff, at defendant's request, delivered to him the following securities: [*describe them*] as collateral security for the payment of a debt of — dollars, with interest from —, then owing by plaintiff to defendant.

That at the maturity of said collaterals, the amounts thereof were collected by defendants [*or, said collaterals were sold by defendant*], and, by application of the proceeds thereof, said indebtedness was wholly paid and extinguished.

That after the payment of said debt there remained a balance of — dollars in defendant's hands, belonging to plaintiff, payment of which was demanded by plaintiff on the — day of —, 18—, and refused.

That said sum of — dollars is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

304.—Against attorney at law for money collected.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff retained the defendant, who was an attorney at law, duly authorized to practice in all the courts of this state, to collect and receive moneys due plaintiff from one —, and pay the same over to the plaintiff, after deducting his fee of — dollars [*or, his reasonable fee*].

That on or about the — day of —, 18—, the defendant, as such attorney, collected and received said sum of — dollars from said —.

That on the — day of —, 18—, the plaintiff demanded of defendant the payment of said sum less his said fee [*or, less his reasonable charges, which amounted to — dollars, and no more*], which was refused [*and the defendant has converted the same to his own use*].

That there is now due to the plaintiff and unpaid the sum of — dollars, for which he demands judgment. [Signature.]

1. Necessary allegations. Ante, vol. 1, § 257.

2. When liable for interest. Walpole v. Bishop, 31 Ind. 156.

3. May retain fees due him for other services. The Union, etc., Ins. Co. v. Buchanan, 100 Ind. 63.

Motion to compel payment of money collected. See ATTORNEYS, p. 531.

305.—For money received by defendant to be paid to plaintiff.

[Caption and commencement.]

That on the — day of —, 18—, one — was indebted to the plaintiff in the sum of — dollars.

That on said day he paid the same to the defendant, for the use of the plaintiff, and defendant promised and agreed to pay the same to plaintiff on the — day of —, 18— [or, within a reasonable time].

That on the — day of —, 18—, the plaintiff demanded the same of the defendant, but payment was refused.

That said sum is now due the plaintiff from the defendant, and wholly unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[Signature.]

1. Party for whose benefit promise is made may sue. Ante, vol. 1, § 36 and n. e; The First National Bank of Crown Point v. The First National Bank of Richmond, 76 Ind. 561.

2. Complaint for recovery of money must state amount. R. S. 1881, § 338; ante, vol. 1, § 345; Colson v. Smith, 9 Ind. 8; Kemp v. Mitchell, 36 Ind. 249.

See ACCOUNT, pp. 12-15.

MORTGAGES.

SECTION LXIII.

ON REAL ESTATE.

306.—For personal judgment and to foreclose.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff the sum of — dollars six months thereafter, with interest from said date until paid, at the rate of — per cent per annum.

That on said day, to secure the payment of said note, the defendant executed to plaintiff his mortgage, a copy of which is filed herewith, and made a part of this complaint.

That there is now due and unpaid on said note the sum of — dollars [*or, said note is now due and wholly unpaid*].

Wherefore, the plaintiff demands judgment for — dollars, and asks that said mortgage be foreclosed, and the real estate therein described, or so much thereof as may be necessary to pay and satisfy plaintiff's debts and costs, be sold for that purpose, and for all other proper relief.

[*Signature.*]

[*Copy of note and mortgage.*]

307.—Against husband and wife and subsequent incumbrancer for personal judgment on several notes, part of which are not yet due.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, executed to plaintiff his three several promissory notes, copies of which are filed herewith, and made parts hereof, marked Exhibits A, B, and C, respectively, each for — dollars, payable in one, two, and three years respectively thereafter, with — per cent interest from date until paid.

That, to secure the payment thereof, said defendant, and the defendant, —, his wife, on the — day of —, 18— [*or, on said day*], executed to the plaintiff a mortgage on the real estate therein

described, a copy of which is filed herewith, and made a part of this complaint, marked Exhibit D.

That on the — day of —, 18—, the defendant, —, took from said defendants a subsequent mortgage on said real estate for — dollars. [Or, the defendant, —, claims to hold some lien upon said real estate, the nature of which is unknown to plaintiff; but plaintiff alleges the same to be subsequent to and subordinate to the lien of his said mortgage].

That plaintiff's mortgage was duly recorded in the office of the County Recorder of — county on the — day —, 18—.

That the first of said notes is now due. The second, with its accumulated interest, will fall due on the — day of —, 18—, and the third, with its accumulated interest, will fall due on the — day of —, 18—, and all of said notes are wholly unpaid.

Wherefore, the plaintiff demands judgment against the defendant, —, for — dollars on the note now due, and asks that, in default of the payment of the amount now due, or that may become due before judgment herein, said mortgage may be foreclosed, and said premises sold, free of all claims of the defendants, and the proceeds be applied to the plaintiff's debt and costs, and for all other proper relief.

[Signature.]

[Copies of notes and mortgage marked Exhibits A, B, C and D.]

308.—To correct mistake in mortgage and to foreclose.

[Caption and commencement.]

That on the — day of —, 18—, the defendant was indebted to the plaintiff in the sum of — dollars, payable on the — day of —, 18—, and was the owner in fee simple of the following real estate in the county of —, State of Indiana [describe it particularly.]

That on said day the defendant promised and agreed with the plaintiff to execute to him a mortgage on said real estate, to secure the payment of said debt.

That in pursuance of said agreement he executed the mortgage, a copy of which is filed herewith, and made a part of this complaint.

That by mistake of the scrivener, who drew said mortgage, the description contained therein was inserted instead of the one above set out, and which was intended to be inserted by the plaintiff and defendant and said scrivener.

That by the mutual mistake of the parties, said mortgage was executed, delivered, and accepted, by said erroneous description, and believing it to contain the true and correct description.

That the defendant has no title or interest in the real estate contained in said mortgage.

That said sum of — dollars is now due and unpaid.

Wherefore, the plaintiff demands judgment against the defendant for — dollars, and asks that said mortgage be corrected by striking therefrom said erroneous description and inserting in lieu thereof the true and correct description in accordance with the agreement of the parties, and that said mortgage, as reformed and corrected, be foreclosed, and the real estate or so much thereof as may be necessary may be sold for the payment of plaintiff's debt and costs, and for all other proper relief.

[*Copy of mortgage.*]

[*Signature.*]

1. When mistake will be corrected, and against whom. Ante, vol. 2, § 1410; *Sanders v. Farrell*, 83 Ind. 28; *Hewitt v. Powers*, 84 Ind. 295; *Pence v. Armstrong*, 95 Ind. 191; *Armstrong v. Short*, 95 Ind. 326; *Craven v. Butterfield*, 80 Ind. 503; *Axtel v. Chase*, 83 Ind. 546; *Burkam v. Burk*, 96 Ind. 270.

2. When made good by allegations in complaint. Ante, vol. 1, § 390; *Pence v. Armstrong*, 95 Ind. 191; *Travelers' Ins. Co. v. Yount*, 98 Ind. 454; *Leslie v. Merrick*, 99 Ind. 180; *Hannon v. Hilliard*, 101 Ind. 310.

309.—Claim for taxes paid to preserve security.

[*Add to usual Form:*] Said defendant, —, wholly failed to pay the taxes on said premises, and plaintiff, in order to protect his security, on the — day of —, 18—, paid the taxes and penalty, amounting to the sum of — dollars, and took the receipt of the county treasurer therefor, a copy of which is filed herewith, and made a part of this complaint.

That said sum has not been repaid to the plaintiff, and is now due.

[*In the prayer, request judgment for this amount, that it be declared a lien, etc.*]

1. Lien-holder may pay taxes and hold a lien therefor. The statute provides that the *treasurer's receipt* shall constitute the lien. R. S. 1881, § 6451.

If so, the receipt would seem to be the foundation of the action, and should be made a part of the complaint.

310.—Demand for a receiver.

[*Add to usual form:*] That a large amount of taxes and ground rents are in arrears, to-wit [*state amounts*]; the rents of said property are not being collected, or if collected, are not being applied to paying said taxes and ground rents, and the property will probably be insuf-

ficient to discharge the mortgage debt, being only of the value of — dollars [or, the property consists of land, with a house thereon, which is left unoccupied and is falling into dilapidation for want of care and repairs, and is exposed to the elements and the depredations of trespassers, and is in danger of being materially injured].

[*Add in the prayer a request:*] That a receiver be appointed to take charge of the property, rent the same, and collect the rents and profits, and apply them to the payment of taxes, ground rent, necessary repairs, and to the payment of plaintiff's claim.

1. When receiver will be appointed. R. S. 1881, § 1222; ante, vol. 2, § 1483; *Pressley v. Harrison*, 102 Ind. 14.

311.—Claim for insurance.

[*Add to usual form:*] That said mortgage contains a covenant by said defendant, —, to keep said premises insured for the benefit of plaintiff in the sum of — dollars, and that, in default thereof, plaintiff could procure insurance at said —'s expense, and the premium therefor should be held by him as an additional lien on said real estate.

That said defendant wholly failed to keep said premises insured.

Whereupon, plaintiff, on the — day of —, 18—, caused said premises to be insured in the — company for the term of — years, and paid as a premium therefor — dollars. [*In the prayer ask that judgment include this amount.*]

312.—To declare a deed a mortgage and to foreclose.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, being indebted to the plaintiff in the sum of — dollars, to secure the payment of the same executed to plaintiff a deed, a copy of which is filed herewith, and made a part of this complaint, for the real estate therein described.

That said deed was executed for the sole purpose of securing the payment of said debt and was intended as a mortgage.

That said debt is now due and wholly unpaid.

Wherefore, the plaintiff asks that said sum of — dollars be declared a lien on said real estate; that said deed be declared a mortgage and foreclosed as such; and that said real estate, or so much thereof as may be necessary to pay and satisfy plaintiff's claim and costs, be sold for that purpose, and for all other proper relief.

[*Copy of deed.*]

[*Signature.*]

1. When deed will be declared a mortgage. *Conwell v. Evill*, 4 Blkf. 67; *Blair v. Bass*, 4 Blkf. 539; *Davis v. Stonestreet*, 4 Ind. 101; *Cross v. Hepner*, 7 Ind. 359; *Wheeler v. Ruston*, 19 Ind. 334; *Smith v. Parks*, 22 Ind. 59; *Crane v. Buchanan*, 29 Ind. 570; *Graham v. Graham*, 55 Ind. 23; *Caress v. Foster*, 62 Ind. 145; *Cravens v. Kitts*, 64 Ind. 581; *Landers v. Beck*, 92 Ind. 49; *Lucas v. Hendrix*, 92 Ind. 54; *Combs v. Nelson*, 91 Ind. 123.

313.—Against subsequent purchaser, who has assumed the mortgage.

[Caption and commencement.]

That on the — day of —, 18—, one —, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars, with — per cent interest from date until paid.

That, to secure the payment of said note, he also, on said day, executed his mortgage on certain real estate therein described, a copy of which is filed herewith, and made a part of this complaint.

That on the — day of —, 18—, said — sold and conveyed said real estate to the defendant, who, in consideration thereof, assumed said mortgage and agreed to pay plaintiff the amount due or to become due on said note.

That said note is now due and unpaid.

Wherefore, the plaintiff demands judgment for — dollars, and that the equity of redemption of the defendant in said real estate be forever barred and foreclosed, and that said real estate, or so much thereof as may be necessary to pay and satisfy plaintiff's debt and costs, be sold and the proceeds applied thereto, and for all other proper relief.

[Signature.]

[Copy of note and mortgage..]

1. Parties. A purchaser from the mortgagor, who assumes and agrees to pay the mortgage debt, may be sued alone, and personal judgment be taken against him, as well as a foreclosure, or the mortgagor and his grantees may be joined. *Ante*, vol. 1, § 142; *Carnahan v. Tousey*, 93 Ind. 561.

As to necessary and proper parties generally in foreclosure proceedings, see *ante*, vol. 1, § 135–149; *Jones v. Parks*, 78 Ind. 537; *Hill v. Minor*, 79 Ind. 48; *Ætna L. Ins. Co. v. Finch*, 84 Ind. 301; *Berkshire L. Ins. Co. v. Hutchings*, 100 Ind. 496; *Petry v. Ambroscher*, 100 Ind. 510.

Where a note is made payable to or indorsed to the cashier of a bank, he is a trustee of an express trust, and may foreclose the mortgage, securing the same in his own name. *Holmes v. Boyd*, 90 Ind. 332.

2. When party assuming mortgage becomes debtor of mortgagee. It is held that a vendee who assumes the mortgage does not become the debtor of the mortgagee until acceptance by the latter, and that until such

acceptance or suit brought the mortgagor and his vendee may rescind the contract. *Berkshire L. Ins. Co. v. Hutchings*, 100 Ind. 496.

3. What sufficient description in mortgage. Ante, vol. 1, § 390; *Parker v. Teas*, 79 Ind. 235; *Dutch v. Boyd*, 81 Ind. 146; *Brown v. Ogg*, 85 Ind. 234; *Pence v. Armstrong*, 95 Ind. 191.

4. Description in complaint. Ante, vol. 1, § 390; *Leslie v. Merrick*, 99 Ind. 180; *Hannon v. Hilliard*, 101 Ind. 310.

5. When recording must be alleged. Ante, vol. 2, § 1409; *West v. Wright*, 98 Ind. 335.

6. Prayer for relief, what sufficient. Ante, vol. 1, §§ 424, 425; *Shotts v. Boyd*, 77 Ind. 223.

7. Necessary allegations. (a.) *In actions by assignees.* Ante, vol. 2, § 1411; *Nichol v. Henry*, 89 Ind. 54.

(b.) *In an action against one who has assumed the mortgage.* Ante, vol. 2, § 1409; *Carnahan v. Tousey*, 93 Ind. 561; *Ellis v. Johnson*, 96 Ind. 377; *Berkshire, etc., Ins. Co. v. Hutchings*, 100 Ind. 496.

(c.) *Against subsequent incumbrancer.* Ante, vol. 2, § 1409.

(d.) *Where mortgagor is dead.* *Lovering v. King*, 97 Ind. 130.

SECTION LXIV.

CHATTEL MORTGAGES.

314.—To foreclose chattel mortgage making subsequent incumbrancers parties.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, —, by his promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay the plaintiff — dollars — months after date.

That, to secure the payment thereof, said defendant, on said day, executed to plaintiff a mortgage on his stock of goods and merchandise and store fixtures, then situate in his store building on — street, in —, in the county of —, Indiana, a copy of which mortgage is filed herewith, and made a part of this complaint.

That on the — day of —, 18—, the defendant, —, took a mortgage from said defendant on said stock and fixtures for — dollars, the lien of which is subordinate to that of the plaintiff's mortgage.

That on the — day of —, 18—, the defendant, —, recovered judgment against said defendant, —, for — dollars, in the

— Circuit Court, and has caused execution to issue thereon, which is a lien on said stock and fixtures, but subordinate to plaintiff's lien.

That plaintiff's mortgage was duly recorded in the recorder's office of said county on the — day of —, 18—.

That said note is now due and unpaid.

Wherefore, the plaintiff demands judgment against the defendant, —, for — dollars, and asks that the equity of redemption of the defendants in and to said property be forever barred and foreclosed, and that the same be sold and the proceeds be applied first to the plaintiff's debt and costs, and that the balance, if any, be paid into court, to be disposed of according to law, and for all other proper relief.

[Signature.]

[Copy of note and mortgage.]

1. Necessary allegations. Ante, vol. 2, § 1414, et seq.

2. What sufficient description of property. Ante, vol. 2, § 1415.

3. When must be recorded. Ante, vol. 2, § 1414; R. S. 1881, § 4918
Towell v. Hollweg, 81 Ind. 154.

SECTION LXV.

INDEMNIFYING MORTGAGES.

315.—On mortgage to indemnify against loss as surety on bond.

[Caption and commencement.]

That on the — day of —, 18—, in consideration of plaintiffs becoming surety for the defendant, —, on a bond then given by him to one —, in the sum of — dollars, conditioned for his faithful performance of —, said defendant, and his wife, the defendant, —, duly executed to plaintiff their mortgage, a copy of which is filed herewith, and made a part of this complaint, on the real estate [or, personal property] therein described, conditioned that if said — should save plaintiff harmless and free from liability for having become such surety on said bond, the same should be void, otherwise to be in full force.

That said — did not save plaintiff harmless and free from liability as such surety, but, on the contrary, plaintiff was, on the — day —, 18—, compelled to pay, and did pay, as such surety, the sum of — dollars, which is now due and unpaid.

Wherefore, plaintiff asks that said mortgage be foreclosed, and said premises sold, and the proceeds applied to the payment of the sum due plaintiff and costs, and for all other proper relief.

[*Copy of mortgage.*]

[*Signature.*]

316.—To indemnify surety against loss, and to pay debt.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration that plaintiff would become surety for him on a note to one — for — dollars, payable on the — day of —, 18—, a copy of which is filed herewith, and made a part of this complaint, the defendant executed to plaintiff a mortgage, a copy of which is filed herewith, and made a part of this complaint, on the real estate therein described, conditioned that the defendant would pay said note at maturity and save the plaintiff harmless and free from liability as such surety.

That at the maturity of said note the defendant did not pay the same, and the plaintiff was compelled to pay, and did, on the — day of —, 18—, pay the same, amounting to the sum of — dollars, which, with the interest thereon, is now due to the plaintiff, and unpaid.

[*Or, that the defendant did not pay said note at maturity, but the same is now due and unpaid, and the defendant has no other property out of which the debt can be made.*]

Wherefore, the plaintiff demands judgment for — dollars, and asks that said mortgage be foreclosed and said premises sold, and the proceeds applied to the payment of said debt and costs, and for all other proper relief.

[*Copy of note and mortgage.*]

[*Signature.*]

1. When mortgagee may foreclose without paying the debt. *Ante*, vol. 2, § 1417, vol. 3, p. 72, note 3; *Loehr v. Colborn*, 92 Ind. 24; *Malott v. Goff*, 96 Ind. 496.

2. When may recover personal judgment without paying debt. *Gunel v. Cue*, 72 Ind. 34; *Bodkin v. Merit*, 86 Ind. 560; *Malott v. Goff*, 96 Ind. 496; *Reynolds v. Shirk*, 98 Ind. 480.

3. Creditor may foreclose. *Loehr v. Colborn*, 92 Ind. 24; *ante*, p. 73.

4. Necessary allegations. *Catterlin v. Armstrong*, 101 Ind. 258.

See **INDEMNIFYING BONDS**, p. 71; **INDEMNITY**, p. 164.

SECTION LXVI.

TO SATISFY AND REDEEM.

317.—To declare and enter satisfaction of mortgage.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, —, was the owner in fee-simple of the following real estate in the county of —, State of Indiana: [*describe it.*]

That on said day, being indebted to the defendant in the sum of — dollars, evidenced by his promissory note for said sum, with — per cent interest from date, payable to defendant — months after that date, he and the plaintiff, —, his wife, executed to the defendant, to secure the payment of said indebtedness, a mortgage on said real estate, which was, on the — day of —, 18—, duly recorded in the recorder's office of said county in Deed Record, No. —, page —.

That on the — day of —, 18— [*or, at the maturity thereof*], the plaintiff, —, fully paid and satisfied said note, and requested the defendant to acknowledge satisfaction of said mortgage, but he refused, and still refuses, to do so, and the same remains of record unsatisfied, and is a cloud upon the plaintiff's title to said real estate.

Wherefore, the plaintiffs pray the court that said mortgage be declared satisfied, and that the clerk of this court be ordered to enter satisfaction thereof on the record, and for all other proper relief.

[*Signature.*]

1. Court may order clerk to enter satisfaction. Anderson Building, etc., Ass'n v. Thompson, 87 Ind. 278.

2. Necessary allegations. The Anderson, etc., Ass'n v. Hoppes, 90 Ind. 250.

318.—To redeem.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff was the owner in fee-simple of the following real estate in the county of —, State of Indiana: [*describe it.*]

That on said day he was indebted to the defendant in the sum of — dollars, to fall due on the — day of —, 18—, and to secure the payment of the same the plaintiff executed a mortgage to the de-

fendant on said real estate, which was duly recorded in the recorder's office of said county on the — day of —, 18—.

That said indebtedness fell due on the — day of —, 18—, when there was owing thereon the sum of — dollars, which sum the plaintiff then tendered to the defendant in payment thereof, but the defendant refused to accept or receive the same, and demanded payment of — dollars, which was more than was due thereon.

[Or, That the plaintiff has made payments to defendant on said indebtedness, at various times, of which he has kept no account, and the amount of which is to the plaintiff unknown; and on the — day of —, 18—, said indebtedness became due, and plaintiff applied to the defendant for an accounting and requested to know the amount still due thereon, and then and there offered to pay any amount that might be found due the defendant, but the defendant refused to make known the amount due or to come to an accounting with the plaintiff.]

That plaintiff now offers to pay the defendant said sum of — dollars, the amount due him [and brings the same into court for his use].

[Or, The plaintiff alleges that the amount due the defendant, secured by said mortgage, is — dollars, and no more, which sum he now offers to pay him (and brings the same into court for his use).]

[Or, The plaintiff now offers to pay any sum of money that may be found by this court to be due the defendant and secured by said mortgage.]

Wherefore, the plaintiff prays the court that he be allowed to redeem said real estate from said mortgage by the payment of said sum of — dollars [or, that an account may be taken between the plaintiff and defendant and the amount due and secured by said mortgage be ascertained, and that the plaintiff be allowed to redeem from said mortgage by the payment of the sum so found to be due], and that upon the payment thereof said mortgage be declared satisfied, and that the defendant be required to enter satisfaction thereof of record; and upon his failure to do so within ten days, that such entry be made by the clerk of this court, and for all other proper relief. [*Signature.*]

1. Necessary allegations. *Kemp v. Mitchell*, 36 Ind. 249; *Sorce v. Huff*, 102 Ind. 422. See also *Lilly v. Dunn*, 96 Ind. 220.

2. Parties, who may redeem. *Lilly v. Dunn*, 96 Ind. 220; *Gordon v. Lea*, 102 Ind. 125.

As to who may redeem after sale, see ante, vol. 2, § 1191.

SECTION LXVII.

MUNICIPAL CORPORATIONS.

319.—Against city for damages by change of street grade.

[*Caption and commencement.*]

That the defendant is a municipal corporation, duly organized under the general laws of the State of Indiana.

That the plaintiff is, and has been since the — day of —, 18—, the owner in fee-simple of the following real estate in said city, fronting on — street: [*describe it.*]

That on the — day of —, 18—, the grade of said street in front of plaintiff's said premises had been established by an ordinance of said city, entitled —, passed on said day, and said street was improved in accordance with said grade.

That thereafter the plaintiff erected on his said premises, at great cost, a dwelling-house, barn, and other buildings, and fences, and planted upon it fruit and ornamental trees with reference to said grade.

That on the — day of —, 18—, the defendant, without having changed the grade of said street, caused the same to be excavated and the level of the street to be lowered in front of plaintiff's premises to the average depth of — feet, and removed the dirt and gravel therefrom and deposited it in other streets of said city, thereby greatly injuring said street.

That, by reason thereof, ingress and egress to said premises and the improvements thereon has been rendered difficult, dangerous, and inconvenient, and the value of said property has been greatly diminished [*state any special damages*].

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [*Signature.*]

1. When city liable for damages caused by change of grade.
City of Delphi v. Evans, 36 Ind. 90; Musselman v. Manley, 42 Ind. 462; City of Aurora v. Fox, 78 Ind. 1; Sims v. The City of Frankfort, 79 Ind. 446; City of Wabash v. Alber, 88 Ind. 428; City of Kokomo v. Mahan, 100 Ind. 242.

320.—To enjoin change of grade.

[Caption and commencement.]

That the defendant is a municipal corporation, duly organized under the general laws of the State of Indiana.

That the plaintiff is and has been since the — day of —, 18—, the owner in fee-simple of the following real estate, fronting — street, in said city [*describe it*].

That on the — day of —, 18—, said city, by an ordinance entitled —, established the grade of said street and the sidewalk, and thereafter improved the same, in front of plaintiff's said premises, in accordance therewith.

That the plaintiff, thereafter, erected on his said premises, at great expense, a dwelling-house, out-houses, and fences, planted fruit and ornamental trees, and put down permanent walks connecting with said sidewalk.

That on the — day of —, 18—, the defendant, by an ordinance entitled —, changed the grade of said street and sidewalk in front of plaintiff's premises, so that the same, if made to conform thereto, will have to be excavated and the level thereof lowered in front of plaintiff's premises to the average depth of — feet.

That the defendant, the city of —, has let the contract to change said grade to the defendant, —, who is about to commence work thereon, and will do so unless enjoined by this court.

That the defendant, the city of —, has neither assessed nor tendered the damages that will be occasioned to plaintiff by said change, and is about to cause the change by said defendant, —, without making any such assessment or tender.

That if said change of grade is made, the plaintiff's premises will be permanently injured in this [*state specifically the injury that will result, e. g.*], ingress and egress thereto will be rendered difficult, inconvenient, and dangerous, the permanent walks put down will be rendered useless, the excavation of the street and sidewalk making it impossible to use them in getting to or from the sidewalk, the dwelling-house and other buildings will be far above the street and sidewalk and rendered inconvenient of access, and by said change the plaintiff will be damaged in the sum of — dollars.

Wherefore, the plaintiff prays the court that the defendant be enjoined from doing any work or making any change in said street or sidewalk, until the damages that will result to the plaintiff therefrom be assessed and tendered, and for all other proper relief.

[If a temporary restraining order or injunction is sought, ask therefor in prayer for relief and verify the complaint.] [Signature.]

1. City may be enjoined when. R. S., 1881, § 3073; *The City of Logansport v. Pollard*, 50 Ind. 151; *The City of Kokomo v. Mahan*, 100 Ind. 242.

2. Necessary allegations. *The City of Kokomo v. Mahan*, 100 Ind. 242.

As to the extent of the injury necessary to warrant the interposition by a court of equity, see *Erwin v. Fulk*, 94 Ind. 235, and cases cited; *The City of Kokomo v. Mahan*, 100 Ind. 242.

See INJUNCTION, page 167.

321.—Neglect to keep street in repair.

[Caption and commencement.]

That the defendant is a municipal corporation, duly organized under the general laws of the State of Indiana.

That on the — day of —, 18—, a certain street in said city, known as the — street, which was much traveled and used by the citizens thereof, and the public generally, was negligently allowed to become out of repair, and at a point thereon, between — and — streets, there was a dangerous hole therein, of which the defendant had notice, and failed and neglected to improve the same for the space of — days.

[Or, that on the — day of —, 18—, the defendant contracted with one — to improve and grade said street, and, in so doing, a large and dangerous excavation was made therein.]

That on the — day of —, 18—, and the night following, said hole [excavation] was negligently allowed to remain open, exposed and without lights or guards.

That on said night, plaintiff was lawfully traveling on said street, and, by reason of said hole being so negligently left open and unguarded, accidentally, and without fault on his part, was precipitated into said hole, whereby he was greatly injured [*state how injured and any special damages*].

To his damage — dollars, for which he demands judgment.

[Signature.]

1. When city liable for defects in streets. *The City of Huntington v. Breen*, 77 Ind. 29; *The City of Logansport v. Justice*, 74 Ind. 378; *City of Delphi v. Lowery*, 74 Ind. 520; *Murphy v. The City of Indianapolis*, 83 Ind. 76; *The City of Washington v. Small*, 86 Ind. 462; *City of Elkhart v. Wickwise*, 87 Ind. 77; *The City of Indianapolis v. Murphy*, 91 Ind. 382; *City of Lafayette v. Weaver*, 92 Ind. 477; *City of Indianapolis v. Cook*, 99 Ind. 10; *Faulkner v. City of Aurora*, 85 Ind. 130; *City of Fort Wayne v. De Witt*, 47 Ind. 391; *North Vernon v. Voegler*, 103 Ind. 314.

2. Liability for negligence of contractor. *City of Logansport v. Dick*, 70 Ind. 65.

3. Failure to compel street railroad to provide safe guards. *Kistner v. City of Indianapolis*, 100 Ind. 210.

3. Necessary allegations. *City of Huntington v. Breen*, 77 Ind. 29; *Murphy v. The City of Indianapolis*, 83 Ind. 76; *City of Washington v. Small*, 86 Ind. 462; *City of Lafayette v. Weaver*, 92 Ind. 477; *Turner v. City of Indianapolis*, 96 Ind. 51; *City of Fort Wayne v. De Witt*, 47 Ind. 391; *City of Lafayette v. Larson*, 73 Ind. 367; *City of Indianapolis v. Scott*, 72 Ind. 196; *City of Bloomington v. Rogers*, 83 Ind. 261; *Town of Rushville v. Poe*, 85 Ind. 83; *Corporation of Bluffton v. Mathews*, 92 Ind. 213.

4. Liability for injury resulting from negligence of fellow-servant. The rule that the master is not liable for injury resulting from the negligence of a fellow-servant is held not to apply to municipal corporations. *City of Lafayette v. Allen*, 81 Ind. 166; *Turner v. City of Indianapolis*, 96 Ind. 51.

5. Measure of damages. *City of Indianapolis v. Gaston*, 58 Ind. 224; *The Carthage Tp. Co. v. Andrews*, 102 Ind. 138.

322.—Neglect to keep sewer open.

[*Caption and commencement.*]

That the defendant is a municipal corporation, duly organized under the general laws of the State of Indiana.

That the plaintiff is, and has been since the — day of —, 18—, the owner in fee-simple, and in possession, of a certain lot, with a dwelling-house and appurtenances, on — street, between — and — streets, in said city.

That said city has a sewer under and along said street where the same is adjacent to said premises, through which large quantities of waste and surface-water, from the streets and cellars in said city, is accustomed to find escape, and with which plaintiff's cellar communicates by a drain.

That defendant negligently failed to keep said sewer in repair, and allowed it to become filled with dirt and rubbish, by reason whereof, the flow of water has been, ever since the — day of —, 18—, greatly impeded, and said water was thereby set back through plaintiff's said drain into his cellar, and ever since said day said cellar has been, by reason of said water being so set back, flooded at times of rain, and kept damp and unhealthy at all times, whereby, his enjoyment of said property has been greatly diminished, and the value thereof greatly lessened. [*Allege any special damages.*]

To his damage — dollars, for which he demands judgment.

[*Signature.*]

1. Liability for neglecting sewers. *City of South Bend v. Paxon*, 57 Ind. 228; *Leeds v. The City of Richmond*, 102 Ind. 372.

2. For negligent construction of sewers. City of Evansville v. Decker, 84 Ind. 325; Rozell v. City of Anderson, 91 Ind. 591; City of Crawfordsville v. Bond, 96 Ind. 236; City of Indianapolis v. Hoffer, 30 Ind. 235; Weis v. City of Madison, 75 Ind. 241; Cummins v. City of Seymour, 79 Ind. 491.

323.—Injury from water.

[*Caption and commencement.*]

That the defendant is a municipal corporation, organized under the general laws of the State of Indiana.

That at the time of the grievances, hereinafter mentioned, the plaintiff was, and still is, the owner in fee-simple of the following real estate, fronting on — street, in said city: [*describe it,*] together with the improvements thereon, consisting of a substantial brick dwelling house of the value of — dollars.

That said property is at a short distance south from certain vacant property belonging to the defendant, which is on a level, — feet higher than plaintiff's property.

That the defendant, during the autumn of 18—, caused a large excavation to be made on its said property, and left the earth thereon piled up in such a way as to accumulate all the surface-water a space of an acre, which theretofore was accustomed to dissipate itself in all directions, and to sink into the ground where it fell, and thereby caused the same at every rain-fall to discharge in a body down the hill, towards and upon plaintiff's premises; and by reason of said water being so thrown in quantities on said hillside it became saturated and was caused to break and slide upon plaintiff's lot, whereby said lot was caused to crack, break, and slide, and the improvements thereon were moved, and the foundations, plastering, sides, partitions, and other parts of said house, were cracked and damaged, and said building was pushed away from its foundation.

That said damage has been, and is, increasing with every rain, and, unless the cause thereof is removed, said improvements will be wholly destroyed.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

1. When city liable for injury resulting from surface water. City of North Vernon v. Voegler, 89 Ind. 77; City of Evansville v. Decker, 84 Ind. 325; City of Crawfordsville v. Bond, 96 Ind. 236; Weis v. City of Madison, 75 Ind. 241; North Vernon v. Voegler, 103 Ind. 314.

2. For injury resulting from public improvements generally. City of Indianapolis v. Hoffer, 30 Ind. 235; Cummins v. City of Seymour, 79 Ind. 491; City of North Vernon v. Voegler, 89 Ind. 77; Platter v. The City of Seymour, 86 Ind. 323.

3. Necessary allegations. *Weis v. City of Madison*, 75 Ind. 241; *Cummins v. City of Seymour*, 79 Ind. 491; *City of North Vernon v. Voegler*, 89 Ind. 77.

4. When liable for not preventing unlawful use of streets—Coasting. *Faulkner v. City of Aurora*, 85 Ind. 130; *City of Lafayette v. Timberlake*, 88 Ind. 330.

5. For failure to perform governmental powers—not liable. *City of Lafayette v. Timberlake*, 88 Ind. 330, and cases cited.

6. When liable for acts of servants. *Robinson v. City of Evansville*, 87 Ind. 334; *Platter v. City of Seymour*, 86 Ind. 323; *The Indianapolis, etc., Ry. Co. v. Johnson*, 102 Ind. 352.

7. Measure of damages. *City of South Bend v. Paxton*, 67 Ind. 228.

324. By city to collect judgment it was compelled to pay.

[*Caption and commencement.*]

That plaintiff is a municipal corporation, duly organized under the general laws of the State of Indiana.

That on the — day of —, 18—, the defendant duly entered into an agreement with plaintiff, whereby he agreed to construct a sewer along a certain street in said city known as — street.

That, in the construction of said sewer, defendant excavated the earth in or near the middle of said street, in such a manner as to make a deep trench about — feet long and — feet deep, and it then became defendant's duty to erect, maintain, and keep lights, and guards, and barriers, to protect travelers from falling therein.

That on the — day of —, 18—, the defendant neglected to keep lights or guards about said trench, in consequence of which one —, while lawfully passing along said street, unavoidably, and without fault on his part, fell into said trench and was greatly injured.

That said — brought an action against this plaintiff to recover his damages for said injury, of the pendency and prayer of which this plaintiff, on the — day of —, 18—, duly notified the defendant and requested him to defend the same.

That on the — day of —, 18—, said — recovered a judgment against this plaintiff in said action for the sum of — dollars, which plaintiff was compelled to pay and did pay to said —, on the — day of —, 18—.

That on the — day of —, 18—, the plaintiff demanded of defendant repayment of said amount, but no part thereof has been paid, and the same is now due.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

1. City may recover amount of the judgment it has been com-

pelled to pay. *McNaughton v. City of Elkhart*, 85 Ind. 384; *City of Elkhart v. Wickwise*, 87 Ind. 77; *Town of Centerville v. Woods*, 57 Ind. 192.

2. Defendant having been notified is bound by first judgment. *McNaughton v. City of Elkhart*, 85 Ind. 384; *City of Elkhart v. Wickwise*, 87 Ind. 77.

3. Incorporation of city or town under general law presumed. It is better pleading to allege the incorporation of the city or town, and under what law it is incorporated. But the failure to make such allegation does not render the complaint bad, as in the absence of any showing on the subject the court will presume an incorporation under the general law. *Town of Brazil v. Kress*, 55 Ind. 14; *Town of Centerville v. Woods*, 57 Ind. 192; *The State v. Hauser*, 63 Ind. 155.

For further forms affecting cities, see **MANDAMUS**, p. 218; **NEGLIGENCE**, p. 243.

SECTION LXVIII.

NEGLIGENCE.

See **AGENTS**, p. 19; **ANIMALS**, pp. 24-28; **BAILMENTS**, p. 29; **BANKS**, p. 33; **COMMON CARRIERS**, p. 124; **MALPRACTICE**, p. 214; **MUNICIPAL CORPORATIONS**, p. 234; **BONDS AND UNDERTAKINGS**, p. 84; **RAILROADS**, p. 271; **SHERIFFS**, p. 290.

325.—Negligent fire.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, plaintiff was [and still is] [the owner and] possessed of about — acres of land, situate in — county, Indiana, on which there was a barn, containing six tons of hay belonging to plaintiff, and a fruit orchard was also on said land, all of which defendant well knew.

That defendant, on said day, intentionally and negligently kindled a fire on his land next adjoining plaintiff's, and at a distance of — rods from plaintiff's said land and so negligently watched and tended the said fire, that, without any negligence or fault on the part of the plaintiff, it came into plaintiff's said land, consumed said barn and the hay therein, of the value of — dollars, and also — rods of post and rail fence on said land, of the value of — dollars, and killed — bearing fruit trees in said orchard of the value of — dollars,

and consumed and destroyed plaintiff's grass growing on said land to his damage — dollars.

Wherefore, the plaintiff demands judgment for — dollars.

[Signature.]

1. Liability for injury by fire used in carrying on business. *Gagg v. Vetter*, 41 Ind. 228; *Helwig v. Jordan*, 53 Ind. 21.

2. For fire started on defendant's own premises. *The Pittsburg, etc., Ry. Co. v. Culver*, 60 Ind. 469; *Brinkman v. Bender*, 92 Ind. 234.

3. Necessary allegations. It is not sufficient to allege negligence in starting the fire. The gist of the action is in allowing the fire to escape and communicate with plaintiff's property. Therefore it must be alleged that the fire was allowed to reach plaintiff's property through the negligence of the defendant. *The Pittsburg, etc., Ry. Co. v. Culver*, 60 Ind. 469; *Pittsburg, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Pittsburg, etc., Ry. Co. v. Hixon*, 79 Ind. 111; *Pittsburg, etc., Ry. Co. v. Jones*, 86 Ind. 496; *Louisville, etc., Ry. Co. v. Kringing*, 87 Ind. 351; *Brinkman v. Bender*, 92 Ind. 234.

And it must be shown by a direct allegation, or by a statement of the facts, that the plaintiff was not guilty of contributory negligence. *The Pennsylvania Co. v. Gallatine*, 77 Ind. 110.

And the negligence of the defendant must be the proximate cause of the injury. *The Pennsylvania Co. v. Whitlock*, 99 Ind. 16.

See RAILROADS, p. 271.

326.—For negligent collision of vehicle with plaintiff's vehicle—Servant's negligence.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff was the owner of a certain carriage, and horse drawing the same, in which carriage he was riding on said day along a public highway, at —, and defendant was then possessed of a certain vehicle drawn by a horse along said highway, then under the care and direction of defendant [of a certain servant of defendant, then employed by defendant to drive said horse attached to said vehicle.]

That the defendant [by his said servant] then and there so carelessly, negligently, and improperly drove and managed said horse and vehicle, that by reason of his negligence said vehicle struck plaintiff's carriage, and thereby broke and damaged said vehicle and injured said horse [*describe the injuries*], and threw plaintiff out of his carriage upon the ground, thereby [*state injuries to plaintiff*].

That plaintiff was lawfully traveling on said highway, and used proper care to avoid said collision, and the same, and the injuries resulting therefrom, were the result of defendant's said negligence, and without any fault on plaintiff's part.

That by reason thereof, plaintiff incurred — dollars expense in repairing said carriage, and was deprived of the use of said horse for — days, and incurred — dollars expense in curing him, and plaintiff was, for — days, prevented from attending to his business, and incurred — dollars expense for medical attendance and nursing in being cured.

To his damage — dollars, for which he demands judgment.

[Signature.]

1. Negligence of servant, how alleged. Where the act complained of was done by the servant of the defendant, it may be alleged directly as the act of the defendant. *Haywood v. Hedrick*, 94 Ind. 340; *Ohio, etc., Ry. Co. v. Callam*, 73 Ind. 261.

2. When master liable for act of servant. *The Evansville, etc., Ry. Co. v. Baum*, 26 Ind. 70; *Wright v. Compton*, 53 Ind. 337; *Helfrich v. Williams*, 84 Ind. 553; *Teagarden v. McLaughlin*, 86 Ind. 476.

3. Joinder of parties. The action may be against both the master and servant jointly. *Wright v. Compton*, 53 Ind. 337.

327.—Dangerous building—Privy.

[Caption and commencement.]

That on the — day of —, 18—, defendant was [the owner and] in possession and control of a certain building [*briefly describe it*], which building was then used by him as a hotel or common inn, and on said day plaintiff was lawfully in said building. [*If the building is not a place of public resort, add: by request of defendant; or, if induced by defendant, in any other way, to go upon the premises, state how*].

That upon said premises, as part of said building, is a privy, for the use of persons lawfully in said building, built over a privy vault, but said privy was so negligently constructed, and so carelessly managed, that the floor thereof had become out of repair and decayed, and dangerous; and on said day defendant, well knowing the premises, negligently and wrongfully left the same unguarded, and without any signal or warning, in consequence whereof, plaintiff, while properly and necessarily in said privy, without fault on his part, fell through said floor.

By means whereof, the plaintiff was greatly hurt and injured [*describe injuries, and state any special damages*] to his damage — dollars, for which he demands judgment.

[Signature.]

1. Necessary allegations. In order to render a party liable for an injury resulting from mere negligence he must owe some duty to the person injured. Therefore the complaint must show either that the house is one used as a public resort, or that the plaintiff was there at the defendant's request, or was

in some way induced by him to be there. *Evansville, etc., R. R. Co. v. Griffin*, 100 Ind. 221.

328.—Negligence in navigating boat.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was the owner of a certain flat-boat, of the value of — dollars, then afloat in the Ohio river, near —, and loaded with [*state what*], and defendant was then and there [the owner and] possessed of a certain steam-boat, called —, and had the management and direction thereof.

That defendant, at said time and place, so negligently and carelessly managed said steam-boat that the same, through his negligence and mismanagement, without any fault of plaintiff, with great force ran foul of and struck against plaintiff's said flat-boat, and thereby broke and greatly damaged the same, and thereby said goods and chattels of the plaintiff, then on board of said flat-boat, were greatly wetted and spoiled.

By reason whereof, plaintiff has been obliged to expend, and has expended, the sum of — dollars in and about repairing said flat-boat, and in saving and taking care of said goods and chattels, and was deprived of the use of said flat-boat for — days.

To plaintiff's damage — dollars, for which he asks judgment.

[*Signature.*]

329.—Leaving horse unhitched.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant was possessed of a horse and cart, and negligently and carelessly left them in a certain public highway, called the —, at —, where the same was accustomed to be crowded and thronged with passengers, without any one to take care of the same, and without tying or securing said horse.

That said horse and cart, through defendant's said negligence, then ran and, without any fault or negligence on plaintiff's part, struck against plaintiff, who was lawfully on said highway, injuring him [*state how*].

To plaintiff's damage — dollars, for which he asks judgment.

[*Signature.*]

330.—Selling toy pistol.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, being a dealer in such articles, negligently sold to —, a son of plaintiff, aged — years, a toy pistol, and cartridges, loaded with powder and leaden ball

to be used therein, and then and there instructed said —, who was too young to understand its use, to load the same, all of which was unknown to plaintiff and without his fault.

That said pistol was loaded by defendant; when sold to said —, with powder and ball, and defendant well knew the dangerous character of the same, and that said — was too young to be trusted therewith.

That on the — day of —, 18—, said —, not knowing how to use said pistol, or understanding its dangerous character, accidentally, and without the fault of said — or this plaintiff, fired the same off, thereby inflicting on one —, another son of plaintiff, a serious injury by [*describe the injury, e. g.*] shooting him through the arm.

That, by reason of said injury, the plaintiff lost the services of said — for — days, and was compelled to pay out for medical services and other expenses, in curing him of said wound, — dollars, to his damage — dollars, for which he demands judgment.

[*Signature.*]

1. Liability for selling explosives to children. For an interesting discussion of this question and a thorough review of the authorities, see the opinion of Elliott, J., in *Binford v. Johnson*, 82 1nd. 426.

331.—For injury of employe resulting from defective machinery.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff was employed by the defendant to work for him in and about his —, wherein the defendant then owned and was operating a steam engine in the prosecution of his business of —.

That on said — day of —, 18—, while plaintiff was at work in said building, and near said engine, in the proper discharge of his duties under said employment, one of the boilers connected with said engine exploded, whereby the plaintiff was greatly injured [*state how and the nature of the injury*].

That said explosion occurred by reason of the defectiveness and unsafe condition of said boiler, the same being old and rusted and unfit for use, all of which was known to the defendant, who negligently and carelessly used the same in his said business.

That the defective and unsafe condition of said boiler was unknown to defendant, and said explosion and the injury to defendant resulting therefrom were without any fault or negligence on his part.

That by reason of said injuries the plaintiff was rendered unable to work for — days, and was compelled to and did pay out — dollars for medical care and other expenses necessary to bring about his cure, to his damage — dollars, for which he demands judgment.

[Signature.]

1. Necessary allegations. *Mitchell v. Robinson*, 80 Ind. 281; *Boyce v. Fitzpatrick*, 80 Ind. 526; *City of Lafayette v. Allen*, 81 Ind. 166.

2. Duty of master in providing safe machinery and keeping it so. *Mitchell v. Robinson*, 80 Ind. 281; *Umbach v. Lake Shore, etc., Ry. Co.*, 83 Ind. 191; *The Louisville, etc., Ry. Co. v. Orr*, 84 Ind. 50; *Nordyke v. Van Sant*, 99 Ind. 188; *Indiana Car Co. v. Parker*, 100 Ind. 181; *The Pennsylvania Co. v. Long*, 94 Ind. 250.

3. Contributory negligence. As to what will amount to contributory negligence in such cases, see *Umbach v. Lake Shore, etc., Ry. Co.*, 83 Ind. 191; *Indiana Car Co. v. Parker*, 100 Ind. 181.

4. Liability of master for injury resulting from negligence of other servant. This is a question that has given rise to many perplexing inquiries, and the cases bearing upon it are very numerous. Some of the later decisions are cited here in order to show the extent and bearing of the rules relating to co-employees and the liability of masters for injury resulting from their negligent acts, without attempting to state what these rules are, or to distinguish the decided cases. *Mitchell v. Robinson*, 80 Ind. 281; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Ohio, etc., Ry. Co. v. Callam*, 73 Ind. 261; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Nordyke & Marmon Co. v. Van Sant*, 99 Ind. 188; *Indiana Car Co. v. Parker*, 100 Ind. 181; *The Brazil, etc., Co. v. Cain*, 98 Ind. 282; *The Atlas Engine Works v. Randall*, 100 Ind. 293; *Bogard v. The Louisville, etc., Ry. Co.*, 100 Ind. 491.

332.—Against county for injury resulting from defective bridge.

[Caption, as a claim before board of county commissioners, and commencement.]

That on the — day of —, 18—, on the — highway, in said county, leading from — to —, was a bridge across — creek, which it was the duty of said county to maintain and keep in repair, it being under its control.

That said bridge was negligently suffered and allowed by said county to become out of repair, the timbers thereof being, on said day, decayed and rotten to such an extent that it was dangerous for passengers to pass over the same, all of which was known to said county.

That on said day the plaintiff, not knowing the decayed and dangerous condition of said bridge, attempted to drive over the same with his team of horses and wagon loaded with —; and, by reason of the decayed and dangerous condition of said bridge, caused by the

neglect of said county to repair the same, and without any fault on plaintiff's part said bridge gave way and precipitated plaintiff and his team into the creek below, a distance of — feet, whereby plaintiff, without fault on his part, was greatly injured by [*describe the injury*]; one of his horses, of the value of — dollars, was killed; said —, with which his wagon was loaded, was damaged by water — dollars, and his wagon was broken and injured.

That plaintiff was compelled to pay out — dollars for medical attendance and other expenses in curing himself, and paid — dollars for the repair of said wagon, and was rendered unable to perform any labor for — weeks, to his damage — dollars.

Wherefore, he asks that he be allowed said sum of — dollars as a valid claim against the county.

[*Signature.*]

[*Verification.*]

1. When county bound to repair bridges. *State v. The Board of Comrs., etc.*, 80 Ind. 478; *State v. Demaree*, 80 Ind. 478; *Board of Comrs., etc., v. Brown*, 89 Ind. 48; *Board of Comrs., etc., v. Legg*, 93 Ind. 523.

2. Liability of county for injury resulting from defective bridge. *House v. Board of Comrs., etc.*, 60 Ind. 580 (28 Am. Rep. 657); *Board of Comrs., etc., v. Pritchett*, 85 Ind. 68; *Board of Comrs., etc., v. Deprez*, 87 Ind. 509; *Board of Comrs., etc., v. Domke*, 94 Ind. 72; *The Board of Comrs., etc., v. Emerson*, 95 Ind. 579; *Patton v. Board of Comrs., etc.*, 96 Ind. 131.

3. Necessary allegations. Formerly a claim must have been filed against the county, before the board of commissioners, and if disallowed the claimant might appeal or bring an independent action, at his option. *R. S. 1881, § 5771*; *Board of Comrs., etc., v. Pritchard*, 85 Ind. 68.

But under the present statute it is held that the only remedy is by appeal. *State v. The Board of Comrs., etc.*, 101 Ind. 69; *Board of Comrs., etc., v. Maxwell*, 101 Ind. 268; *Pfaff v. The State*, 94 Ind. 529.

As a claim, before the board of commissioners, less strictness is required in the pleading than if brought in the circuit court. *Board of Comrs. v. Domke*, 94 Ind. 72; *The Board of Comrs. v. Bacon*, 96 Ind. 31; *Duncan v. Board of Comrs., etc.*, 101 Ind. 403.

The form given above is such as would be required if the action were brought in the circuit court. *Board of Comrs., etc., v. Deprez*, 87 Ind. 509; *Board of Comrs., etc., v. Legg*, 93 Ind. 523; *Board of Comrs., etc., v. Bacon*, 96 Ind. 31; *Board of Comrs., etc., v. Brown*, 89 Ind. 48; *Board of Comrs., etc., v. Domke*, 94 Ind. 72.

And this is the better practice, as all of these facts must be established to authorize a recovery, and the pleading serves to direct the proof.

4. Contributory negligence. As to what will amount to, and how negatived in the complaint, see *Board of Comrs., etc., v. Brown*, 89 Ind. 48; *Board of Comrs., etc., v. Legg*, 93 Ind. 523; *Board of Comrs., etc., v. Domke*, 94 Ind. 72.

SECTION LXIX.

INJURIES RESULTING IN DEATH.

333.—By administrator against railroad company.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was, by the — Circuit Court, duly appointed administrator of the estate of —, deceased.

That the defendant is, and was at the times hereinafter mentioned, a corporation duly organized under the laws of the State of —, and owned and operated a railroad, known as the — road, and was a common carrier of passengers for hire.

That on the — day of —, 18—, the defendant, in consideration of the sum of — dollars, received said —, then living, as a passenger on said road from — to —, and while said — was on the cars on said journey, at —, and in this state, the car in which — was then riding was, by the negligence of defendant and its servants in the running and management of said cars, thrown from the track, and the said — was, without fault on his part, thereby killed.

That said — left one —, his widow, and —, —, and —, his children, aged —, —, and — years respectively, who were dependent on him for maintenance and support, and who are still living.

Whereby the said widow and children of said deceased were damaged in the sum of ten thousand dollars.

Wherefore, plaintiff demands judgment for said sum of ten thousand dollars.

[*Signature.*]

1. Necessary allegations. (a.) *Negligence on part of defendant, how alleged.* Ante, vol. 1, § 400; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Jones v. White*, 90 Ind. 255; *Cleveland, etc., Ry. Co. v. Wyant*, 100 Ind. 160.

(b.) *Negligence of deceased, how negatived.* The *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; ante, vol. 1, § 400.

Where suit is by administrator, it need not be alleged that he was without fault. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87.

It is otherwise where the action is by a parent for the death of his minor child. *Sullivan v. Toledo, etc., Ry. Co.*, 58 Ind. 26; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87.

(c.) *Ave-ment as to next of kin.* The right of the administrator to sue is

based upon the existence of some relative of the deceased entitled to inherit from him. *Ante*, vol. 1, §§ 65, 113.

Therefore, that he left such kin must be alleged, but it is not necessary to give their names. *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48; *Binford v. Johnson*, 82 Ind. 426; *Stewart v. Terre Haute, etc., R. R. Co.*, 103 Ind. 44.

2. Contributory negligence, what will amount to. *Nave v. Flack*, 90 Ind. 205; *Lake Erie, etc., Ry. Co. v. Fix*, 88 Ind. 381; *Terre Haute, etc., Ry. Co. v. Buck*, 96 Ind. 346.

3. Proximate and remote cause of injury. Upon the question of proximate and remote causes in actions for negligence, generally, see *Binford v. Johnson*, 82 Ind. 426; *Henry v. Dennis*, 93 Ind. 452; *Terre Haute, etc., Ry. Co. v. Buck*, 96 Ind. 346; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; *Kistner v. City of Indianapolis*, 100 Ind. 210.

4. Action by parent—Necessary allegations. *Sullivan v. Toledo, etc., Ry. Co.*, 58 Ind. 26; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *The Pennsylvania Co. v. Long*, 94 Ind. 250.

5. Willful injury—Necessary allegations. Where the injury is alleged to have been willfully inflicted it is not necessary to negative negligence on the part of the defendant. *Ante*, vol. 1, § 400; *Pennsylvania Co. v. Smith*, 98 Ind. 42.

But the allegation of gross negligence, recklessness, or wantonness, is not equivalent to an allegation that the act was purposely and willfully done, or sufficient to avoid the necessity of showing that the plaintiff was without fault. *The Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286; *The Pennsylvania Co. v. Smith*, 98 Ind. 42.

6. Parties. As to who are proper parties in actions for damages for injuries resulting in death, see *ante*, vol. 1, §§ 65, 112, 113, 114.

SECTION LXX.

NEW TRIAL.

334.—For newly discovered evidence.

[*Caption and commencement.*]

That on the — day of —, 18—, this defendant brought an action against this plaintiff, in this court, to recover — dollars and interest from — on a certain promissory note, and this plaintiff, for answer to the same, pleaded [*state what, e. g.*] the general denial and payment, and such proceedings were had that at the — term, 18—, of said court the defendant herein, at a trial before a jury, recovered a verdict and judgment against this plaintiff for — dollars.

That on the trial of said cause it became and was a material ques-

tion whether [*state what, e. g.*] this plaintiff had, on the — day of —, 18—, paid the defendant — dollars on said note or not.

That the following evidence was given on the trial of said cause: [*set it out in full.*] And this was all the evidence given therein.

That since the trial of said cause, and since the term of court at which the same was tried, this plaintiff has discovered that one —, a competent witness, whose testimony can be procured at the next term of this court [*or, within a reasonable time*], knows, and will testify, that [*state fully to what facts the witness will testify*], and would have testified to said facts on said trial, if he had been called as a witness, as shown by his affidavit, filed herewith, and made a part of this complaint.

That this plaintiff did not know, at the time of the trial of said cause, or until after said term, that said — knew of said facts, or that the plaintiff could prove the same.

That this plaintiff used due diligence to procure said testimony at said trial by [*state fully what was done to procure the testimony*], but the same could not be discovered before or during said term of court.

Wherefore, the plaintiff prays the court that a new trial be granted him in said cause.

[*Signature.*]

[*Verification.*]

[*Attach affidavit of witness.*]

1. Necessary allegations and practice generally. As to what the complaint should contain and the practice in this class of cases, see ante, vol. 1, §§ 952-959; *Kitch v. Oatis*, 79 Ind. 96; *Ragsdale v. Mathews*, 93 Ind. 589; *Hines v. Driver*, 100 Ind. 315.

See MOTIONS, p. 432.

SECTION LXXI.

NUISANCES.

335.—Unguarded excavation next to sidewalk.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant was in possession of a message in —, fronting on — street, which was a common highway and open to the use of the public.

That on said day defendant caused an excavation [cellar] to be dug on said premises, to the depth of — feet, to the edge of [*or, extending — feet into*] the sidewalk of said street, and negligently per-

mitted the same to remain during the night-time following said day, open and unguarded, and without any light or signal or precautions to prevent accidents to passers by.

In consequence whereof, the plaintiff, while passing along said street, on said night, without any fault on his part, fell into said excavation [cellar], whereby he was much bruised and wounded, and his arm was broken by said fall, and he became sick and unable to attend to his business for — weeks, and incurred an expense of — dollars in endeavoring to be cured, to his damage — dollars, for which he asks judgment. [Signature.]

See NEGLIGENCE, p. 243; MUNICIPAL CORPORATIONS, p. 239.

336.—Building material, or trench, in street.

[Caption and commencement.]

That on the — day of —, 18—, at —, defendant was in possession of a certain messuage, in —, on — street, which was a public highway.

That on said day, defendant placed large quantities of building material, and piles of sand, in said street, near said premises [dug a trench in said street, from said premises, towards the gas or water mains therein, about — feet deep and — feet wide, for the reception of service pipe from said mains], and negligently and wrongfully left the same without any light or signal during the night-time following said day.

That in consequence of said negligence, a certain carriage and horse, of plaintiff, while being driven by plaintiff's servant along said street during the evening of said day, without fault of the driver thereof, ran over said piles of sand, and collided with said building material [fell into said trench], and said carriage was overturned, and was injured to the extent of — dollars, and said horse was wounded and injured to the amount of — dollars, and plaintiff was deprived of the use of said horse for — days, to his damage — dollars for which he asks judgment. [Signature.]

See NEGLIGENCE, p. 248; MUNICIPAL CORPORATIONS, p. 324.

337.—Obstructing easement.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff was, and still is [the owner in fee-simple and] possessed of a certain farm at — [describe

briefly], and had, and ought still to have, a certain right of way from the south-east corner thereof, over defendant's lands, to a certain public highway, known as the — road, with the right to pass and re-pass on foot or with teams [*or according to the fact*].

That defendant, on said day [while plaintiff was possessed of said farm], wrongfully obstructed said way by — [building a fence across it], and still continues [and for — weeks continued] said obstruction, thereby preventing plaintiff from enjoying said way.

To plaintiff's damage — dollars, for which he demands judgment.

[*Signature.*]

338.—Backing up water.

[*Caption and commencement.*]

That before and at the time of committing the wrongs, hereinafter described, plaintiff was owner of a farm [*describe property briefly*] through which the waters of a certain stream, known as —, were accustomed to flow, and plaintiff was, and is, entitled to the free and unobstructed flow of said waters in the channel of said stream, below said property.

That on the — day of —, 18—, defendant erected, and has ever since maintained, a dam, to a great height, across said stream, below plaintiff's property, and has thereby, during said time, obstructed and stopped the natural flow of the water of said stream, and raised it — feet above its ordinary level, and caused it to back upon the property and flood the same, whereby — acres of hay, then growing thereon, of the value of — dollars, was destroyed, and — rods of fence, of the value of — dollars, were washed away and lost, — acres are covered with water, and — other acres are made wet and swampy, and thereby rendered useless.

To plaintiff's damage — dollars, for which he demands judgment.

[*Signature.*]

339.—Obstructing water-course.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was, and ever since has been, lawfully possessed [*if not in possession, say: the owner in fee of certain premises*], being [*describe same briefly; and, if the injury affects a special use, aver such use, e. g.*], on which was a saw-mill and box factory, and appurtenances propelled by water.

That plaintiff had, before said time, and still is entitled of right to use and enjoy the current of water in a certain stream known as —, which before said time, flowed, and still ought to flow, to said prem-

ises [mill and factory] for supplying the same with water, and for other purposes.

That at said date, defendant wrongfully erected, and has ever since maintained, a certain dam across said stream, above said property of plaintiff, and has thereby greatly diminished the current of the water of said stream, which ought to have flowed to said property [mill and factory]. [Or, wrongfully cut and removed the banks of said stream, above said mill, and dug a channel, whereby, large quantities of said water was diverted from its customary channel, and prevented from running to said property (mill and factory)].

That by reason of said wrongful acts of defendant, the rapidity of the current of said water [the quantity of said water] is greatly diminished, and is rendered insufficient to operate said mill and factory, and said mill, which, before said wrongful acts, was able to saw — thousand feet of logs each day, has been, since said acts, able to saw only — thousand feet.

To plaintiff's damage — dollars, for which he demands judgment.

[Signature.]

340.—Erecting and maintaining slaughter-house.

[Caption and commencement.]

That plaintiff was, on the — day of —, 18—, and at all times hereinafter mentioned, has been [the owner and], possessed of the house and lot, No. —, in — street, —, which is in the thickly-populated part of said city, and occupied the said house as a dwelling.

That on the — day of —, 18—, the defendant erected, on lot No. —, on said street, in said city, which is adjoining [or, within — of] plaintiff's said dwelling-house, a slaughter-house, and still maintains the same, and from said day until the present time has continually caused cattle to be brought and killed there, and has caused the blood and offal therefrom to be thrown into the street, opposite the said house of plaintiff, and has so kept said premises that foul and unwholesome smells have been constantly emitted therefrom.

Whereby, plaintiff has been compelled to abandon his said house, and can not rent the same so long as said slaughter-house is maintained on said premises of defendant. [State any other special damages.]

To plaintiff's damage — dollars, for which he demands judgment.

[Signature.]

341.—Right of support in a city or town.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was possessed, as the owner in fee, of a certain three-story brick store-house, known as No. —, — street, in the city of —, — county, Indiana, in which was a large stock of —, of the value of — dollars, and said building adjoined premises whereof defendant was then possessed.

That the foundation of plaintiff's said building, next to defendant's premises, extended downwards to the depth of — feet below the curb of said street, and was entitled to the support of defendant's contiguous ground.

That on said day defendant excavated the earth contiguous and near plaintiff's said building, to a depth of — below the foundation of plaintiff's said building, without shoring up or protecting the same, or leaving any support therefor, by reason whereof, said building was broken and fell to the ground, and was injured to the amount of — dollars, and said goods were crushed and destroyed to the amount of — dollars.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

342.—Against transferree.

[*Caption and commencement.*]

That on the — day of —, 18—, said [*person who erected the nuisance*] conveyed his said premises to the defendant, who has ever since been in possession of the same, and had at the time of said conveyance knowledge of the existence of said nuisance, and has ever since wrongfully maintained and continued the same.

343.—Prayer for abatement.

Wherefore, plaintiff asks that said nuisance may be ordered abated, and that plaintiff recover said sum of — dollars, damages caused thereby.

344.—Prayer for injunction.

Wherefore, plaintiff asks that defendant be enjoined from erecting or using said building as a —, or otherwise, to the nuisance of the plaintiff, or permitting it to be used. And that plaintiff recover — dollars damages.

1. What will amount to a nuisance. R. S. 1881, § 289; New Albany, etc., R. R. Co. v. Higman, 18 Ind. 77; Butler v. The State, 6 Ind. 165; Dipen

v. The Board, etc., 5 Ind. 8; *Terre Haute Gas Co. v. Teel*, 20 Ind. 131; *Smith v. Fitzgerald*, 24 Ind. 316; *Pettis v. Johnson*, 56 Ind. 139; *Haag v. The Board of Comrs, etc.*, 60 Ind. 511; *Hudson v. Densmore*, 68 Ind. 391; *Owen v. Phillips*, 73 Ind. 284; *Benthal v. Seifert*, 77 Ind. 302; *Cairo, etc., R. R. Co. v. Houry*, 77 Ind. 364; *Lippman v. City of South Bend*, 84 Ind. 276; *Keiser v. Lovett*, 85 Ind. 240; *State v. Louisville, etc., Ry., Co.*, 86 Ind. 114; *Reichert v. Geers*, 98 Ind. 73; *Baumgartner v. Hasty*, 100 Ind. 575.

2. When may be abated. R. S. 1881, § 291; *Howard v. The State*, 6 Ind. 444; *Cromwell v. Lowe*, 14 Ind. 234; *New Albany, etc. R. R. Co. v. Higman*, 18 Ind. 77; *Smith v. Fitzgerald*, 24 Ind. 316; *Pettis v. Johnson*, 56 Ind. 139; *City of Indianapolis v. Miller*, 27 Ind. 394; *Maxwell v. Boyne*, 36 Ind. 120; *McLaughlin v. The State*, 45 Ind. 338; *Bidinger v. Bishop*, 76 Ind. 244; *Keiser v. Lovett*, 85 Ind. 240; *Williamson v. Yingling*, 93 Ind. 42; *Waltman v. Rund*, 94 Ind. 225; *Baumgartner v. Hasty*, 100 Ind. 575.

3. When may be enjoined. R. S. 1881, § 291; *Smith v. Fitzgerald*, 24 Ind. 316; *Owen v. Phillips*, 73 Ind. 284; *Pence v. Garrison*, 93 Ind. 345; *Reichert v. Geers*, 98 Ind. 73.

4. Who may sue. R. S. 1881, § 290; *Smith v. Fitzgerald*, 24 Ind. 316; *Pettis v. Johnson*, 56 Ind. 139.

5. Necessary allegations. *Ohio, etc., Ry. Co. v. Simon*, 40 Ind. 278; *Pettis v. Johnson*, 56 Ind. 139; *Haag v. The Board of Comrs, etc.*, 60 Ind. 511; *Owen v. Phillips*, 73 Ind. 284; *Lippman v. The City of South Bend*, 84 Ind. 276; *Waltman v. Rund*, 94 Ind. 225.

6. Right to maintain can not be obtained by prescription. *Sims v. City of Frankfort*, 79 Ind. 446; *State v. Louisville, etc., Ry. Co.*, 86 Ind. 114.

SECTION LXXII.

OFFICE AND OFFICER.

See OFFICIAL BONDS, pp. 74–104; SHERIFFS, p. 290; MONEY HAD AND RECEIVED, p. 224.

345.—To recover fees of usurped office.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff, being eligible thereto, was appointed [at a general election then held in —, was duly elected] to fill the office of —, and thereupon [*or, on the — day of —, 18—*] took the official oath, and executed the official bond required by law, which bond was duly approved by —, and plaintiff

thereby became entitled to hold said office and receive the fees and emoluments thereof from said day for the term of —.

That at said time defendant was in possession of said office, and plaintiff thereupon gave the defendant notice of the foregoing matters, and demanded of him to relinquish said office to plaintiff, and deliver to him the books and papers belonging to the same, all of which the defendant refused to do, and unlawfully continued to fill said office and receive the fees and emoluments thereof from said date until the — day of —, 18—.

That defendant, while so usurping said office, collected and received, as the fees and emoluments thereof, the sum of — dollars, which rightfully belongs to plaintiff, all of which is due to plaintiff and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

1. Right of officer to recover fees from usurper. Glascock v. Lyons, 20 Ind. 1; Douglass v. The State, 31 Ind. 429.

2. Title to the office may be determined in action for fees. Glascock v. Lyons, 20 Ind. 1.

3. Measure of damages. Douglass v. The State, 31 Ind. 429.

PARENT AND CHILD.

See INFANT, p. 166; SEDUCTION, pp. 143, 289.

SECTION LXXIII.

PARTITION.

346.—General form.

[Caption and commencement.]

That the plaintiffs and defendants, —, are the owners in fee simple, as tenants in common, of the following described real estate in the county of —, State of Indiana: [*describe it.*]

That the plaintiffs are each the owners of an undivided — of said real estate, and said defendants, —, the owners of an undivided — each thereof.

That the defendant, —, holds a mortgage given by the defendant,

—, on his undivided interest therein, dated the — day of —, 18—, for the sum of — dollars.

That on the — day of —, 18—, the defendant, —, recovered a judgment in the — Circuit Court against the defendant, —, for — dollars, which is a lien on his undivided interest therein.

That the defendant, —, claims some lien against the interest of the defendant, —, but whether the same is valid or not is unknown to plaintiffs, as well as the nature of said claim.

[That said real estate can not be partitioned and the interests of the several parties set off to them without injury to the parties.]

Wherefore, the plaintiffs pray the court that the parties be declared the owners of said real estate in the shares above set out; that commissioners be appointed and said real estate be partitioned, and the interests of each therein be set off, to be occupied in severalty; that the liens of the defendants, — and —, be declared to be liens against the interests of the defendants, — and —, respectively, and that the same be applied to their interests as set off to them; that the defendant, —, be required to show what lien he may have, if any, on any part of said real estate, and if any is shown that it be declared a lien on the interest of the defendant, —, only, and applied thereto, as set off to him, and for all other proper relief. [Signature.]

1. Parties. As to who are necessary and proper parties, see ante, vol. 1, §§ 157, 158, 159; vol. 2, § 1457; *Shaw v. Beers*, 84 Ind. 528; *Edwards v. Dykeman*, 95 Ind. 509; *Miller v. Smith*, 98 Ind. 226; *Klinesmith v. Socwell*, 100 Ind. 589; *Schori v. Stephens*, 62 Ind. 441.

2. Necessary allegations. Ante, vol. 2, § 1458; *White v. Clawson*, 79 Ind. 188; *Smith v. King*, 81 Ind. 217; *McMahan v. Newcomer*, 82 Ind. 565; *Pipes v. Hobbs*, 83 Ind. 43; *Wintermute v. Reese*, 84 Ind. 308; *Roberts v. Lanam*, 92 Ind. 380; *Miller v. Smith*, 98 Ind. 226.

3. Practice generally. Ante, vol. 2, § 1456 et seq.; *Wilcox v. Monday*, 83 Ind. 335; *Compton v. Pruitt*, 88 Ind. 171; *Elrod v. Keller*, 89 Ind. 382; *Arnold v. Butterbaugh*, 92 Ind. 403; *Edwards v. Dykeman*, 95 Ind. 509; *Luntz v. Greve*, 102 Ind. 173.

4. How far is an adjudication of the title. *Crane v. Kimmer*, 77 Ind. 215; *McMahan v. Newcomer*, 82 Ind. 565; *Hanna v. Scott*, 84 Ind. 71; *Mooney v. Burchard*, 84 Ind. 285; *Wilbur v. Buchanan*, 85 Ind. 42; *Miller v. Noble*, 86 Ind. 527; *Kenney v. Phillipy*, 91 Ind. 511; *Wright v. Nipple*, 92 Ind. 310; *Mathews v. Pate*, 93 Ind. 443; *Elston v. Piggot*, 94 Ind. 14; *Fleenor v. Driskill*, 97 Ind. 27; *Bryan v. Uland*, 101 Ind. 477; *Luntz v. Greve*, 102 Ind. 173.

5. Partition without suit, when binding, and effect of. *Beaver v. Trittipa*, 24 Ind. 41; *Moore v. Kerr*, 46 Ind. 468; *Bumgardner v. Edwards*, 85 Ind. 117; *Switzer v. Hauk*, 89 Ind. 73; *Hauk v. McComas*, 98 Ind. 460; *Savage v. Lee*, 101 Ind. 514

347.—By wife for her third, where land sold on judicial sale against husband.

[*Caption and commencement.*]

That on the — day of —, 18—, one — was, and ever since has been, the husband of the plaintiff, and was on said day, and until the sale thereof to the defendant, as hereinafter alleged, the owner in fee of the following real estate in the county of —, State of Indiana: [*describe it.*]

That on the — day of —, 18—, the defendant recovered a judgment in the — Circuit Court, against said —, which was a lien upon said real estate, and afterward caused an execution to issue thereon, under which said real estate was, on the — day of —, 18—, duly sold by the sheriff of said county to the defendant, in satisfaction of said judgment.

That the inchoate interest of the plaintiff in said real estate was not directed by said judgment to be sold or barred by virtue of said sale.

That on the — day of —, 18—, the time for the redemption thereof having expired, and the same not having been redeemed, said sheriff executed to the defendant a deed for said real estate.

That the plaintiff, as the wife of said —, is the owner in fee of one undivided third of said real estate, and the defendant is, by virtue of said sheriff's deed, the owner of the undivided two-thirds thereof.

Wherefore, the plaintiff demands judgment for the partition of said real estate, and that one-third thereof be set off to her, to be occupied in severalty, and for all other proper relief [*Signature.*]

1. Right of wife to partition statutory. The right of a wife to have her one-third of her husband's real estate set off to her, during his life, is purely statutory, and can only be enforced when within the statute. Therefore, it is held that she is not entitled to partition where the property was sold prior to the enactment of the statute. R. S. 1881, § 2508; *Martin v. Prather*, 82 Ind. 557.

Nor, where the lien is specific, can she maintain the action, if the contract creating it was executed prior to the enactment of the statute, as in case of a mortgage. *McGlothlin v. Pollard*, 81 Ind. 228; *Parkham v. Vandeventer*, 82 Ind. 544; *Helphenstine v. Meredith*, 84 Ind. 1; *Baker v. McCune*, 82 Ind. 585; *Voltz v. Rawles*, 85 Ind. 198; *Vermillion v. Nelson*, 87 Ind. 194.

It is otherwise where the lien arises from the judgment, and not by virtue of the contract upon which it is founded. *Taylor v. Stockwell*, 66 Ind. 505.

In such case, if the judgment is recovered after the enactment of the statute, her right attaches, although the contract was made before.

2. Necessary allegations. *Martin v. Prather*, 82 Ind. 557; *Helphenstine v. Meredith*, 84 Ind. 1; *Elliot v. Cale*, 80 Ind. 285.

3. Rights of second wife, without children. *McClamrock v. Ferguson*, 88 Ind. 208.

4. **When title and right to maintain action vests.** The *title* of the wife becomes absolute on the day of sale, subject to the right of redemption only, and may be conveyed and will pass by descent. The deed, when executed, relates back to the sale. *Hollenback v. Blackmore*, 70 Ind. 234; *Elliott v. Cale*, 80 Ind. 285; *Riley v. Davis*, 83 Ind. 1; *Youst v. Hays*, 90 Ind. 418.

And if the land is not redeemed she is entitled to one-third of the rents for the year. *Riley v. Davis*, 83 Ind. 1; *Summit v. Ellett*, 88 Ind. 227.

But the right to maintain the action for partition does not accrue until the time for redemption has expired. *Elliott v. Cale*, 80 Ind. 285; *Youst v. Hays*, 90 Ind. 418.

SECTION LXXIV.

PARTNERSHIP.

348.—For dissolution of partership.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant entered into a partnership for the purpose of carrying on the business of —, at — [under articles of partnership, by which it was agreed by said parties—*state the clauses in the articles the breach of which is complained of*].

That said parties each contributed — dollars to the capital of said partnership, and were [by said articles] to share the profits and losses equally [*or, state the terms of the partnership*], and thereupon said business was begun and carried on by them.

That on the — day of —, 18—, the defendant [*here state the acts or causes for dissolution, e. g.*], without plaintiff's assent, and against his will, assigned and transferred to the defendant —, all his interest in said partnership, and all his right to all the property and assets of the firm, whereby, the same became dissolved. [*Or, made an assignment, for the benefit of his creditors, to one —.*]

[*Or, took exclusive possession and custody of all the partnership—property and books—and has ever since excluded plaintiff from all access to the same.*]

[*Or, has from time to time, ever since said date, without the knowledge or consent of plaintiff, misapplied, and appropriated to his own use, large sums of money from the partnership property, in excess of his proportion thereof, whereby, he became indebted to the firm in a large amount, to-wit: — dollars [or, the amount of which is unknown to the plaintiff], and on the — day of —, 18—, plaintiff,*

on the discovery of said misappropriation and indebtedness, demanded of defendant that he should return said money [or, for an accounting and the return of the amount found due], which defendant failed and refused to do].

That said firm is possessed of a large and valuable stock of goods, and have a large amount of debts due them, and a valuable good-will, which are of far greater value, when taken together, than if separated, and no equitable division of the assets and good-will of the partnership can be made without great loss to all parties, except by a sale thereof together, and a division of the proceeds.

Wherefore, plaintiff prays that the said partnership be adjudged dissolved, and a receiver of the property and good-will be appointed, with power to dispose of the same under the direction of the court, and that, after payment of all debts, the proceeds be equally divided between the parties, and for all other proper relief.

[If the appropriation of an uncertain amount is alleged, an accounting should be prayed for.]

[Signature.]

349.—Dissolution on notice.

[Caption and commencement.]

That said articles provided that either partner should have the right, on thirty days' written notice to the other partner of such intention, to dissolve said partnership. Plaintiff desires to dissolve and close up said partnership, and, on the — day of —, 18—, notified defendant [according to the provisions of the articles, if form of notice specified], in writing, of his intention to dissolve the same.

1. When suit for dissolution may be maintained. Kimble v. Seal, 92 Ind. 276; Selking v. Baile, 27 Ind. 343.

2. Necessary allegations. Kimble v. Seal, 92 Ind. 276.

350.—For an accounting after dissolution.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff entered into partnership with the defendants for the purpose of carrying on the business of —, in —, for the term of — years next thereafter.

That plaintiff paid in, as capital to the said business, the sum of — dollars, and the defendant paid in, as capital, — dollars. [If the profits and losses were not to be received and borne equally, state what the agreement was.]

That on the — day of —, 18—, plaintiff and defendant com-

menced said business, as partners, under the firm name of —, and continued in the same until the — day of —, 18—.

That at the time last mentioned, by the mutual consent of said partners, the firm was dissolved, and the defendants agreed with the plaintiff to take the stock on hand, at a valuation of — dollars, and also to collect the debts due said firm, and pay the debts due by the same, and render, from time to time, to the plaintiff, on demand, full statements of the debts due to, and owing by, said firm, and the payments made on account thereof, and, on a final adjustment, to pay over to the plaintiff his full share of said firm's assets.

That defendants, accordingly, proceeded to take possession of all of the assets of said firm, and have collected the debts due to said firm and applied the proceeds to their own use, instead of paying the debts thereof, and distributing any balance coming to the plaintiff.

That plaintiff has repeatedly requested defendants to give him a statement of the assets of said firm which came to their hands, and of their proceedings in the premises, but they have neglected and refused to render any such account, or to pay over to the plaintiff any portion of said assets.

Wherefore, plaintiff asks that the defendants be compelled to account with him touching the premises, and ordered to pay over to the plaintiff any balance found in their hands coming to him

[*Signature.*]

1. Necessary allegations. Kimble v. Seal, 92 Ind. 276; Dehority v. Nelson, 56 Ind. 414; Meredith v. Ewing, 85 Ind. 410.

351.—To recover balance found due on accounting and settlement.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant entered into partnership for the purpose of carrying on the business of —, at —, for the term of — years thereafter.

That the plaintiff and defendant paid in, as capital stock, the sum of — dollars each, and commenced said business on said day.

That on the — day of —, 18—, plaintiff and defendant had a full and final accounting and settlement of their business, up to said date, and it was found that the defendant was indebted to plaintiff in the sum of — dollars.

That the debts of said firm had all been paid.

That upon said accounting and settlement being had, the business

of said partnership was closed up, and the same was then by mutual consent dissolved.

That on the — day of —, 18—, plaintiff demanded of defendant the payment of said sum of — dollars, but payment was refused, and said sum, with interest, is now due to plaintiff and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

1. When one partner may sue another on account. The rule is that one partner can not sue another for an amount claimed to be due on account of the business of the partnership until there has been an accounting and settlement of the amount due. *Hendry v. Hendry*, 32 Ind. 349; *Page v. Thompson*, 33 Ind. 137; *Briggs v. Daugherty*, 48 Ind. 247; *Skillen v. Jones*, 44 Ind. 136; *Krutz v. Craig*, 53 Ind. 561; *Coleman v. Coleman*, 78 Ind. 344; *Meredith v. Ewing*, 85 Ind. 410; *Warring v. Hill*, 89 Ind. 497; *Lang v. Oppenheim*, 96 Ind. 47; *Dale v. Thomas*, 67 Ind. 570.

There are some early cases apparently the other way, though an attempt has been made in later cases to show that they are not inconsistent with the rule as above stated. *Duck v. Abbott*, 24 Ind. 349; *Shalter v. Caldwell*, 27 Ind. 376; *Heavilon v. Heavilon*, 29 Ind. 509.

If these cases mean what they say they are clearly overruled by the later decisions cited.

But it is held that where there is a separate and distinct liability created by one partner to the other, by the express agreement of the parties, as where one agrees to pay a designated debt of the firm, on sufficient consideration, and by reason of his failure to do so the other is compelled to pay it, an action may be maintained for the recovery of the amount without an accounting or final settlement. *Warbritton v. Cameron*, 10 Ind. 302; *Warring v. Hill*, 89 Ind. 497; *Meredith v. Ewing*, 85 Ind. 410. See also *Dale v. Thomas*, 67 Ind. 570.

In an action after dissolution it must be shown that the debts of the firm have been paid before the action for a balance due can be maintained. *Lang v. Oppenheim*, 96 Ind. 47.

2. Demand, when necessary. *Skillen v. Jones*, 44 Ind. 136; *Krutz v. Craig*, 53 Ind. 561; *Snyder v. Baber*, 74 Ind. 47.

3. Surviving partners and their representatives, when may sue, and how. *Skillen v. Jones*, 44 Ind. 136; *Cobble v. Tomlinson*, 50 Ind. 550; *Krutz v. Craig*, 53 Ind. 561; *Olleman v. Reagan*, 28 Ind. 109; *Huff v. Lutz*, 87 Ind. 471; *Anderson v. Ackerman*, 88 Ind. 481.

4. Parties. As to proper and necessary parties in actions affecting partners generally, see ante, vol. 1, §§ 150-156.

See ACCOUNTING, p. 17; INDEMNITY, p. 164.

PENALTY.

See SHERIFFS, p. 290; ante, vol. 1, §§ 187, 188.

PHYSICIAN AND SURGEON.

See MALPRACTICE, p. 214.

SECTION LXXV.

PRINCIPAL AND SURETY.

352.—By surety to recover amount paid on debt of principal.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff became surety for the defendant on a promissory note to one — for — dollars, payable on the — day of —, 18—, with interest at — per cent per annum from said date.

That the defendant failed to pay said note at maturity, and the plaintiff was, on the — day of —, 18—, compelled to pay the same to said —, amounting, with the accrued interest, to — dollars.

That the plaintiff, on the — day of —, 18—, demanded payment of said sum of the defendant, which was refused, and the same, with the accrued interest, is now due to plaintiff and unpaid.

Wherefore, the plaintiff demands judgment for — dollars.

[*Signature.*]

1. When action by surety will lie. *Hommell v. Gamewell*, 5 Blkf. 5; *Pitzer v. Harmon*, 8 Blkf. 112; *Bennett v. Buchanan*, 3 Ind. 47; *White v. Miller*, 47 Ind. 385; *Jackson v. Adamson*, 7 Blkf. 597; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Collins v. Paris*, 57 Ind. 151.

2. Necessary allegations. The action is not upon the note, but for money paid to the use of the principal. Therefore, the note is not the foundation of the action, and need not be made a part of the complaint. *Ante*, vol. 1, § 418; *Cameron v. Warbritton*, 9 Ind. 351; *Harker v. Glidewell*, 23 Ind. 219; *Sexton v. Sexton*, 35 Ind. 88; *Collins v. Paris*, 57 Ind. 151; *Arbogast v. Hays*, 98 Ind. 26.

3. Limitation. The action falls within the six years' limitation. *Arbogast v. Hays*, 98 Ind. 26.

353.—By surety against co-surety for contribution.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant became sureties for one — on a —, then executed by them and said — to one —, for the payment of — dollars, with interest from that date at — per cent per annum [*or state for what they became sureties, if not for the payment of money*].

That on the — day of —, 18—, said — recovered a judgment in the — Circuit Court against the plaintiff and defendant and said — for the sum of — dollars and — dollars costs.

That execution was issued on said judgment and levied on the property of plaintiff, and plaintiff was compelled to and did pay said judgment and costs in full, amounting to — dollars.

That on the — day of —, 18—, plaintiff notified defendant of said payment, and demanded contribution of his proportion thereof, but no part of the same has been paid, and there is now due thereon to plaintiff from defendant the sum of — dollars.

Wherefore, the plaintiff demands judgment for — dollars.

[Signature.]

1. When contribution may be enforced. *Salyers v. Ross*, 15 Ind. 130; *Bagatt v. Mullen*, 32 Ind. 332; *Boulden v. Seircle*, 34 Ind. 60; *Schooley v. Fletcher*, 45 Ind. 86; *Rankin v. Collins*, 50 Ind. 158; *Judah v. Mieuire*, 5 Blkf. 171; *White v. Carlton*, 52 Ind. 371; *Nurre v. Chittenden*, 56 Ind. 462; *Armstrong v. Harshman*, 61 Ind. 52; *Githens v. Kimmer*, 68 Ind. 362; *Whiteman v. Harriman*, 85 Ind. 49; *Baldwin v. Fleming*, 90 Ind. 177.

2. When held to be co-sureties. *Woodworth v. Bowes*, 5 Ind. 276; *Cecil v. Mix*, 6 Ind. 478; *Dunn v. Sparks*, 7 Ind. 490; *Salyers v. Ross*, 15 Ind. 130; *Armstrong v. Cook*, 30 Ind. 22; *Bowser v. Rendell*, 31 Ind. 128; *Hall v. Hall*, 34 Ind. 314; *Sexton v. Sexton*, 35 Ind. 88; *Core v. Wilson*, 40 Ind. 204; *Harshman v. Armstrong*, 43 Ind. 126; *Nurre v. Chittenden*, 56 Ind. 462; *Armstrong v. Harshman*, 61 Ind. 52; *Whiteman v. Harriman*, 85 Ind. 49; *Baldwin v. Fleming*, 90 Ind. 177.

3. Necessary allegations. *Sexton v. Sexton*, 35 Ind. 88; *Harshman v. Armstrong*, 43 Ind. 126; *Rankin v. Collins*, 50 Ind. 158; *Judah v. Mieuire*, 5 Blkf. 171; *Nurre v. Chittenden*, 56 Ind. 462; *Githens v. Kimmer*, 68 Ind. 362; *Croy v. Clark*, 74 Ind. 597.

354.—By surety to be subrogated to rights of creditor and to recover from principal.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, —, and plaintiff executed to the defendant, —, a promissory note for — dollars, payable — months after date, with — per cent interest from date, a copy of which is filed herewith, and made a part of this complaint.

That the plaintiff was the surety on said note for the defendant, —.

That the defendant, —, on said day executed to the defendant, —, a mortgage on certain personal property therein described to secure the payment of said note, a copy of which mortgage is filed herewith, and made a part of this complaint.

That said mortgage was duly recorded in the recorder's office of ——— county, Indiana, on the ——— day of ———, 18—.

That on the ——— day of ———, 18—, the defendant, ———, brought his action against plaintiff and defendant, ———, on said note, and recovered judgment in the ——— Circuit Court thereon, against said defendant as principal and plaintiff as surety, for ——— dollars, which sum plaintiff was compelled to and did pay.

That the defendant, ———, still holds said mortgage.

That the defendant, ———, has not paid plaintiff said sum of ——— dollars, or any part thereof, and the same is now due.

Wherefore, plaintiff demands judgment against defendant, ———, for ——— dollars, and that plaintiff be subrogated to the rights of the defendant, ———, under said mortgage, and that the same be foreclosed, the property therein described sold and applied to plaintiff's claim, and for all other proper relief.

[*Signature.*]

[*Copy of note and mortgage.*]

1. Right of surety to be subrogated. Jones v. Tinch, 15 Ind. 308; Heeg v. Weigand, 33 Ind. 289; Barlow v. Deibert, 39 Ind. 16; Zook v. Clemmer, 44 Ind. 15; Manford v. Firth, 68 Ind. 83; Gerber v. Sharp, 72 Ind. 553; Spray v. Rodman, 43 Ind. 225; Josselyn v. Edwards, 57 Ind. 212; Rooker v. Benson, 83 Ind. 250; Pence v. Armstrong, 95 Ind. 191; Dunning v. Seward, 90 Ind. 63; Crim v. Fleming, 101 Ind. 164.

See SUBROGATION, p. 306.

SECTION LXXVI.

QUIETING TITLE.

355.—General form.

[*Caption and commencement.*]

That the plaintiff is the owner in fee-simple [*or, state his interest*] of the following real estate, in the county of ———, State of Indiana [*describe it*].

That the defendant claims an interest therein adverse to the plaintiff's rights, which claim is without right and unfounded, and a cloud upon plaintiff's title.

Wherefore, plaintiff prays the court that defendant's claim be declared null and void, and that plaintiff's title to said real estate be quieted.

[*Signature.*]

1. Necessary allegations. It is unnecessary to set out the nature of the defendant's adverse claim. It being a matter peculiarly within his knowledge, it is enough to allege generally that he claims an interest adverse to that of the plaintiff. *Marot v. The Germania, etc., Assn.*, 54 Ind. 37; *The Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind. 383; *Second Nat. Bk. of Lafayette v. Corey*, 94 Ind. 457.

But it must be alleged either that the claim of the defendant is adverse to that of the plaintiff, or is unfounded and a cloud upon his title. *Second Nat. Bk. of Lafayette v. Corey*, 94 Ind. 457; *Nutter v. Fouch*, 86 Ind. 451.

And where the facts are specifically stated, and show that the defendant's claim is valid, or that he has an interest, it is bad, although it alleges in general terms that the claim is unfounded. *Ragsdale v. Mitchell*, 97 Ind. 458.

2. Who may maintain the action. Under the former equitable practice, a bill of peace to quiet title could only be maintained by one in possession. But the statute expressly changes this rule. *R. S. 1881, § 1070*; *Schori v. Stephens*, 62 Ind. 441; *McCaslin v. The State*, 99 Ind. 428.

SECTION LXXVII.

QUO WARRANTO—INFORMATION.

356.—By prosecuting attorney for usurpation of office.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

The State of Indiana, on the relation of —, Prosecuting Attorney for the — Judicial Circuit, v. A. B.	}	Information.
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C. D., Prosecuting Attorney for the — Judicial Circuit of the State of Indiana, gives the court to understand and be informed:

That on the — day of —, 18—, at a general election, then held in the County of —, in the State of Indiana, for the election, among other officers, of a —, for said county, for the term of — years from the — day of —, 18—, one — received the highest number of legal votes for said office, and was duly elected thereto, and, on the — day of —, 18—, duly qualified as such —, and is intitled to hold said office.*

That on the — day of —, 18—, the defendant usurped said office, and has ever since withheld the same from the said —.

Wherefore, he prays the court that the defendant be ousted from said office, and the possession thereof be given to the said —.

C. D.,

Prosecuting Attorney for the — Judicial Circuit.

357.—By private person for usurpation of office.

[*Caption and commencement.*]

That the relator was, on the — day of —, 18—, and has ever since been, a resident and elector of the county of —, State of Indiana, and eligible to be elected to and hold the office of — thereof.

That on the — day of —, 18—, at a general election held in said county for the election, amongst other officers, of — thereof, the relator and defendant were the only candidates for said office, and the relator, at said election, received the highest number of votes for said office, and was duly elected thereto for the term of — years from the — day of —, 18—.

That on the — day of —, 18—, the relator was duly commissioned by the governor of the state as such —, and duly qualified as such.

That on the — day of —, 18—, the defendant usurped the said office of —, and has since held and received the fees and emoluments thereof, amounting to the sum of — dollars, and has, during said time, wrongfully and unlawfully kept the relator out of the possession of said office, and deprived him of the said fees and emoluments, to his damage — dollars.

That on the — day of —, 18—, the relator demanded of the defendant the possession of said office, and the books and papers belonging thereto, which was refused.

Wherefore, plaintiff demands judgment for — dollars damages; that the defendant be ousted from said office, and that the relator have possession thereof.

[*Signature.*]

1. Necessary allegations. R. S. 1881, §§ 1133, 1134; ante, vol. 2, § 1432; Reynolds v The State, 61 Ind. 392; The State v. Bemenderfer, 96 Ind. 374.

2. By whom information may be filed. R. S. 1881, § 1132; ante, vol. 2, § 1430.

3. Title to office may be tried. The State v. Shay, 101 Ind. 36.

358.—By prosecuting attorney for assuming to act as a corporation.

[*Caption.*]

—, Prosecuting Attorney for the — Judicial Circuit, of the State of Indiana, gives the court to understand and be informed:

That the defendants without having been incorporated, are, and have been for — last past, usurping the franchise of being a corporation, by the name of —, and by that name of pleading and being impleaded, answering and being answered, contracting and being contracted with, and of acquiring, holding, using, selling, conveying, and otherwise disposing of property, real and personal, as well within as without the State of Indiana.

Wherefore, the plaintiff prays the court that the defendants be required to show by what right, if any, they claim to have, use, and enjoy the liberties, privileges, and franchises aforesaid, and that they be ousted from using the same. [Signature.]

359.—Forfeiture of franchise.

[Caption and commencement, as in preceding form.]

That the defendant, the — Company, is a corporation, duly organized under the general laws of the State of Indiana, and has been since the — day of —, 18—.

That, as such corporation, it has continuously, since said date, within this state [at the county of —], offended against the laws of the state, misused its corporate authority, franchises, and privileges, and assumed franchises and privileges not granted to it, especially in the following particulars and matters, to-wit: [*here set out the specifications.*]

Wherefore, plaintiff prays that defendant be adjudged to have forfeited its franchises, and be ousted therefrom, or from the franchises unlawfully assumed and abused by it. [Signature.]

1. For what causes quo warranto will lie. R. S. 1881, §§ 1131, 1145; ante, vol. 2, § 1429.

2. By whom information may be filed. Ante, vol. 2, § 1430; Tomlinson v. Bricklayers' Union, 87 Ind. 308; Logan v. The Vernon, etc., R. R. Co., 90 Ind. 552.

3. Necessary allegations. Ante, vol. 2, § 1432; Albert v. The State, 65 Ind. 413.

4. When organization of corporation can not be attacked collaterally. Snyder v. Studebaker, 19 Ind. 462; Baker v. Neff, 73 Ind. 68; Williamson v. The Kokomo, etc., Assn., 89 Ind. 389; Logan v. The Vernon, etc., R. R. Co., 90 Ind. 552.

SECTION LXXVIII.

RAILROADS.

See NEGLIGENCE, p. 243 ; INJURY RESULTING IN DEATH, p. 250.

360.—For injury from defective station.

[*Caption and commencement.*]

That the defendant is a corporation, duly organized under the laws of the State of —, and on the — day of —, 18—, owned and operated a certain railroad, known as the —, with the track, cars, locomotives, and other appurtenances thereto belonging,* and was a common carrier of passengers for hire, between — and —, and used and employed a station at — for the accommodation of the passengers of said road.

That the defendant so carelessly and negligently managed said station, and so carelessly and negligently allowed the staircase and approaches thereto to become out of repair, and failed to provide hand rails, or sufficient accommodation for safe access through said station, to and from defendant's cars, that plaintiff, by reason of the premises, and without fault on his part, having been received by defendant as a passenger at said station, fell and was thrown down said staircase and greatly injured, in this, to wit: [*state the injuries received.*]

By reason of which injuries plaintiff became, and is, and for a long time will be lame and sick, and has been disabled from attending to his business for — weeks, and incurred an expense of — dollars for medical attendance and nursing, to his damage — dollars, for which he demands judgment. [*Signature.*]

For authorities bearing upon complaints against railroad companies, see MUNICIPAL CORPORATIONS, p. 237 ; NEGLIGENCE, p. 243, and notes to forms there given.

361.—Negligent fire.

[*Caption and commencement.*]

[*Follow Form 360 to *, and continue.*] Said railroad runs near certain premises of plaintiff, in said county, on which was, at the time hereinafter stated, a barn of the value of — dollars, in which was

— tons of hay of the value of — dollars, and — bushels of wheat of the value of — dollars, the property of the plaintiff.

That on the — day of —, 18—, defendant, in running its locomotives on said road, carelessly and negligently omitted to use spark arresters, or proper appliances to prevent the emission of sparks from said locomotives, and carelessly and negligently omitted to keep its right of way free and clear of dry and combustible materials, but negligently permitted the accumulation of large quantities of dry grass and weeds on the same, adjoining plaintiff's said premises and barn, and the defendant, on said day, in running its locomotives over said railroad opposite plaintiff's said premises, negligently permitted said locomotives to emit sparks and fire into said dry grass and weeds and combustible material, whereby the same was ignited, and negligently permitted the fire so ignited on its said right of way to escape therefrom and spread to and ignite plaintiff's said barn and destroy the same, together with said hay and wheat.

That said fire was ignited and spread to plaintiff's premises, and said loss resulted without any fault or negligence on plaintiff's part.

To plaintiff's damage — dollars, for which he demands judgment.

[Signature.]

1. Necessary allegations. Ante, p. 243, Form 325, and notes; *Pittsburg, etc., R. R. Co. v. Hixon*, 79 Ind. 111; *Pittsburg, etc., R. R. Co. v. Jones*, 86 Ind. 496; *Louisville, etc., R. R. Co. v. Stevens*, 87 Ind. 198; *Louisville, etc., R. R. Co. v. Ehlert*, 87 Ind. 339; *Louisville, etc., R. R. Co. v. Krimming*, 87 Ind. 351; *Louisville, etc., R. R. Co. v. Hanmann*, 87 Ind. 422; *Wabash, etc., R. R. Co. v. Johnson*, 96 Ind. 40; *Wabash, etc., R. R. Co. v. Johnson*, 96 Ind. 44; *Louisville, etc., R. R. Co. v. Parks*, 97 Ind. 307.

2. Measure of damages. *Cunningham v. The Evansville, etc., R. R. Co.*, 102 Ind. 478.

362.—Frightening plaintiff's team.

[Follow Form 360 to *, and allege]. That defendant constructed its railway across a public highway called the —, and neglected to place the highway in such condition as not to impair its former usefulness; but, on the contrary, diverted the highway and left it at the crossing, and for a distance of — from that point so narrow as to allow but one wagon to pass at once, and wrongfully and negligently placed large piles of ties on the road at and near the crossing.

That on the — day of —, 18—, plaintiff was lawfully driving his wagon and team along said highway, at said point, when said team became frightened at said piles of ties, and because of the narrowness of the road and said obstructions thereon plaintiff could not return or pass around the same, and while said team was under such fright, and

while he was endeavoring to cross said railroad, the agents of the defendant carelessly and negligently approached along the railroad in a hand-car, and knowing the situation of plaintiff, but disregarding their duty, so negligently managed the hand-car as to cause the plaintiff's horses to run away, whereby his wagon was upset and he was thrown against a pile of ties and greatly injured. [*Allege any special damages.*]

That said injury was caused without any negligence or fault on plaintiff's part.

To plaintiff's damage ——— dollars, for which he demands judgment. [*Signature.*]

363.—Collision with team.

[*Follow Form 360 to *, and continue.*] That on the ——— day of ———, 18—, plaintiff was going with a wagon and team of horses, the property of plaintiff, of the value of ——— dollars, along a certain public highway, known as ———, which highway crosses the track of defendant's railroad [at ———], and as plaintiff reached said crossing the defendant caused one of its locomotives and train of cars to approach said crossing and pass rapidly over the track of said railroad, and negligently and carelessly omitted, while approaching said crossing, to give any signal by bell or whistle or otherwise, by reason of which negligence, and without any fault or negligence on plaintiff's part, the locomotive struck said horses, then crossing said track, and killed them and destroyed said wagon and threw plaintiff with great violence to the ground, fracturing his left arm [*state injuries and allege any special damages*].

Whereby plaintiff was damaged in the sum of ——— dollars, for which he demands judgment. [*Signature.*]

See forms and notes under COMPLAINTS FOR NEGLIGENCE, pp. 243–251; COMMON CARRIERS, p. 124.

SECTION LXXIX.

RECEIVERS.

364.—Averment of appointment, and right to sue.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

A. B., Receiver of the — Railway	} Complaint.
Company,	
v.	
C. D.	

A. B., receiver of the — Railway Company, complains of C. D., and alleges:

That on the — day of —, 18—, in an action then pending in the — Circuit Court by — against the said — Railway Company, for — [*state cause of action*], the plaintiff was, by an order of said court [*or, the judge of said court*], duly appointed receiver of the said company, and duly authorized and empowered to sue upon any and all claims or demands due or to become due to said company in his own name.

That [*state the cause of action, and ask judgment, as in other cases*].

1. Complaint must show right of receiver to sue in his own name. If there is no law directly authorizing the receiver to sue in his own name, there must be an order of court, giving him such right, or he must sue in the name of the corporation or person for whom he sues. Therefore it is held that the complaint must affirmatively show authority to sue in his own name where the action is so brought. *Ante*, vol. 2, § 1486; *Garver v. Kent*, 70 Ind. 428; *Keen v. Breckinridge*, 96 Ind. 69.

2. Right of receiver appointed by court of another state to sue. *Metzner v. Bauer*, 98 Ind. 425.

365.—Against receiver.

[*Caption and commencement.*]

That on the — day of —, 18—, in an action then pending in the — Circuit Court, by — against —, for [*state what, e. g.*], the dissolution of a partnership then existing between said parties under the firm name of —, and for the appointment of a receiver, the defendant was duly appointed such receiver, and authorized by said court to settle and close up the business of said firm, and to pay all of the debts of the firm out of any money collected by him as such receiver.

That at the time of the appointment of the defendant as such receiver, said firm was indebted to the plaintiff, on an account for goods and merchandise, a bill of particulars of which is filed herewith, and made part of this complaint, in the sum of — dollars, which sum is still due and unpaid.

That the defendant, as such receiver, has collected moneys of said firm, sufficient to pay said debt, which should be applied thereto.

That on the — day of —, 18—, after said money had come into the hands of the defendant, plaintiff demanded payment of the same, which was refused, the defendant claiming that there was an unsettled account between said firm and plaintiff, and an amount due them from plaintiff, which should be offset against said claim.

That on the — day of —, 18—, plaintiff obtained from said — Circuit Court an order, duly authorizing and permitting him to sue the defendant, as such receiver, on said account.

Wherefore, plaintiff demands judgment for — dollars.

[*Bill of particulars.*]

[*Signature.*]

1. Complaint must aver leave of court to sue. A receiver is an officer of the court appointing him, and holds the property in trust. It is held, therefore, that an action can not be maintained against him, without first obtaining permission of the court to bring the action. And the rule applies as well to actions on money demands as for the recovery of specific property. *Keen v. Breckinridge*, 96 Ind. 69, citing *Hugh on Rec.*, § 254; *De Groat v. Jay*, 30 Barb. 483; *Higgins v. Wright*, 43 Barb. 461; *Barton v. Barbour*, 3 MacArthur, 212 (36 Am. R. 104); *Barton v. Barbour*, 104 U. S. 126.

2. When and in what cases appointed. Ante, vol. 2, § 1483; *Brinkman v. Nitzinger*, 82 Ind. 358; *Bitting v. Ten Eyck*, 85 Ind. 357; *Storm v. Ermantrout*, 89 Ind. 211; *Main v. Ginthert*, 92 Ind. 189; *Buchanan v. The Berkshire Life Ins. Co.*, 96 Ind. 510; *Hursh v. Hursh*, 99 Ind. 509; *Sheeks v. Klottz*, 84 Ind. 471; *Barnes v. Jones*, 91 Ind. 161; *The Travelers' Ins. Co. v. Brouse*, 83 Ind. 62; *Presby v. Harrison*, 102 Ind. 14.

As to the practice in the appointment of receivers, and their powers and duties generally, see ante, vol. 2, §§ 1479-1488.

For other forms, see RECEIVERS, p. 274.

RECOGNIZANCE.

See COMPLAINT ON BONDS AND UNDERTAKINGS, p. 119.

SECTION LXXX.

REFORMATION.

See COMPLAINT ON ACCOUNT STATED, p. 15; To FORECLOSE MORTGAGES, p. 227.

366.—To correct mistake in description in a deed.

[*Caption and commencement.*]

That on the — day of —, 18—, in consideration of — dollars, defendant sold to plaintiff the following real estate, in the county of —, State of Indiana: [*describe it*].

That on said day defendant executed to plaintiff a deed, intending to convey said premises by said description, but, by mistake of the scrivener, who drew the same, and the mutual mistake of plaintiff and defendant, the following description was set out therein, instead of the correct one: [*set out description in deed*], and by the mutual mistake of the parties, said deed, with the erroneous description, was delivered and accepted, supposing it correctly described said real estate, as first above set out.

That on the — day of —, 18—, plaintiff demanded of defendant a correction of said mistake, which was refused.

Wherefore, plaintiff prays that said deed may be reformed, so as to describe said premises properly, and for all other proper relief.

[*Signature.*]

1. Mistake when corrected. The mistake must be shown to have been mutual. The mistake of one of the parties is no ground for a reformation, in the absence of wrong in the other. The complaint should allege clearly what the contract was, and that by mutual mistake it was set out differently in the writing; and this should be shown by alleging distinctly what was set out, so that the mistake will clearly appear. *Ante*, vol. 1, § 390; vol. 2, § 1410; vol. 3, p. 228; *Easter v. Severin*, 78 Ind. 540 *Morrison v. Collier*, 79 Ind. 417; *Schautz v. Keener*, 87 Ind. 258.

2. Mistake of law not ground for relief. The mistake must be as to a matter of fact. If the deed contains what the parties intended it should, and the mistake is as to the legal effect of the words used, no ground for relief is shown without some further allegation, showing fraud or additional ground other than a simple mistake. *Ante*, vol. 2, § 1410; *Easter v. Severin*, 78 Ind. 540; *Armstrong v. Short*, 95 Ind. 326; *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395.

3. Allegations against subsequent purchaser or incumbrancer.

As against a subsequent purchaser for value, or an incumbrancer, it must be alleged that he took with actual knowledge of the mistake. *Easter v. Severin*, 64 Ind. 375.

The instrument, when recorded, is only evidence of what it contains, and can not be notice of the mistake. *Easter v. Severin*, 64 Ind. 375.

4. Demand for a correction necessary. The plaintiff must demand a correction of the mistake before bringing the action. *Axtel v. Chase*, 77 Ind. 74.

5. Voluntary deed, when and in whose favor may be reformed. *Randall v. Ghent*, 17 Ind. 271.

SECTION LXXXI.

REPLEVIN.

367.—General form.

[Caption and commencement.]

That he is [the owner of and] lawfully entitled to the immediate possession of the following personal property [*describe it*], of the value of — dollars, of which the defendant has possession without right, and unlawfully detains from the plaintiff, whereby he has been damaged in the sum of — dollars.

Wherefore, the plaintiff demands judgment for the possession of said property and — dollars damages for its detention, and for all other proper relief. [Signature.]

368.—Affidavit for delivery.

State of Indiana, County of —.

A. B., being duly sworn, says he is the plaintiff in the above entitled cause; that he is [the owner of and] lawfully entitled to the immediate possession of the following personal property: [*describe it specifically, as in the complaint.*]

That the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff [or, that the same was seized and is held by the defendant under an execution issued from the — Circuit Court on a judgment recovered therein by one — against the defendant, but said property is exempt from seizure on execution].

That said property [has been wrongfully taken and] is unlawfully detained by the defendant.

That said property is of the value of — dollars, and is believed to be detained in — county, State of Indiana. [Signature.]

[Jurat.]

1. Necessary allegations. Ante, vol. 2, §§ 1492, 1497, 1499.

2. When action will lie. Ante, vol. 2, §§ 1491, 1492, 1493; *Parrish v. Thurston*, 87 Ind. 437; *James v. Fowler*, 90 Ind. 563; *Louthain v. Fitzer*, 78 Ind. 449; *Hadley v. Hadley*, 82 Ind. 95; *Teepie v. Dickey*, 94 Ind. 124; *Standard Oil Co. v. Bretz*, 98 Ind. 231.

3. Demand, when necessary. The general rule is that where the defendant came into possession of the property rightfully a demand is necessary; if the original taking was wrongful, it is not; but it is universally held that where it is shown that the defendant, although rightfully in possession, has converted the property to his own use, where he is only entitled to the possession, a demand is not necessary. Ante, vol. 1, §§ 257, 262; vol. 2, § 1494; *Parrish v. Thurston*, 87 Ind. 437.

4. Property obtained by fraud—Tender of consideration, when necessary. *Parrish v. Thurston*, 87 Ind. 437. See RESCISSION AND CANCELLATION, p. 279.

5. Description of property in complaint. As to the degree of certainty required in describing the property in the complaint, see ante, vol. 1, § 389; vol. 2, § 1499; *Smith v. Stanford*, 62 Ind. 392; *Malone v. Stickney*, 88 Ind. 594.

6. By execution defendant. Where the action is by the execution defendant, to recover property levied upon, he must show that the property was exempt. *Hartlep v. Cole*, 101 Ind. 458.

But it need not be alleged in the complaint the general allegation of his right to possession, and the wrongful taking or detainer by defendant being sufficient. If, however, he seeks to obtain possession before final judgment, by a writ of replevin, he must make affidavit to the fact, or it must be alleged in a verified complaint. R. S. 1881, § 1267; *Minchrod v. Windoes*, 29 Ind. 288.

7. Affidavit, when necessary. An affidavit is only necessary when the plaintiff claims immediate possession of the property. R. S. 1881, § 1267; ante, vol. 2, § 1498.

If the complaint contains all that is necessary in the affidavit, and is verified no affidavit is necessary. *Minchrod v. Windoes*, 29 Ind. 288; *Cox v. Albert*, 78 Ind. 241.

8. Affidavit, what must contain, and by whom made. R. S. 1881, § 1267; ante, vol. 2, § 1498; *Louisville, etc., Ry. Co. v. Payne*, 103 Ind. 183.

For further forms under REPLEVIN, see COMPLAINTS ON REPLEVIN BONDS, p. 116; BONDS AND UNDERTAKINGS, p. 66; JUDGMENTS, p. 470; VERDICT, p. 430; ANSWER, p. 397.

As to the practice in this class of cases in justices courts, see Schroeder's McDonald, pp. 644, 654.

SECTION LXXXII.

RESCISSION AND CANCELLATION.

369.—By grantor—Conveyance of real estate.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was seized in fee-simple of the following real estate in the county of —, State of Indiana: [*describe it.*]

That defendant, on said day, by fraud, procured and induced plaintiff to execute to defendant a deed of said premises, conveying the same to defendant in fee, by then and there fraudulently and falsely representing to plaintiff that said deed was a mere lease of said premises to defendant for the term of — years.

That plaintiff was illiterate, and could neither read nor write, and believed and relied upon said false representations of defendant, and was thereby induced to execute said deed, believing the same to be a lease as aforesaid, and for no other purpose.

That plaintiff has received no consideration for said conveyance [*or*, defendant paid plaintiff the sum of — dollars, in consideration of the execution of said instrument, which plaintiff accepted as part payment for said lease, and for no other purpose].

That plaintiff did not discover that said instrument was a deed until the — day of —, 18—, when he [tendered to defendant said sum of — dollars and] demanded a return and cancellation of the same, which was refused.

Wherefore, plaintiff demands that said deed be ordered to be delivered up and canceled, and for all other proper relief. [*Signature.*]

370.—To annul subscription to stock of a corporation.

[*Caption and commencement.*]

That on the — day of —, 18—, defendants fraudulently represented to plaintiff that they had organized a company, under the name of —, for the purpose of carrying on the business of —, and that various individuals, to wit [*name them*], well known as men of character and pecuniary responsibility, had taken shares.

That plaintiff believed and relied upon said representations, and was induced thereby and did subscribe for — shares of the capital

stock of said company, of the par value of — dollars, in payment of which plaintiff on said day gave defendants his promissory note in the sum of — dollars, payable on the — day of —, 18—.

That said representations were wholly false, in this, that defendants, for the purpose of defrauding plaintiff and others, had devised and carried out the scheme of organizing said company, and had procured said above named individuals and others to become apparent stockholders, under a secret agreement that they were not to be called on for payment of their stock, but that any notes given by them in payment were to be given up after being used to induce others to subscribe, and said notes were afterward given up to said parties without payment.

That defendant was ignorant of said facts at the time of subscribing to said stock, and did not discover said fraud until the — day of —, 18—.

That said stock is of little or no value, and on the — day of —, 18— [or, immediately upon discovering the fraud that had been practiced upon him], plaintiff notified defendants of his election to rescind said subscription, and tendered to them a surrender of said stock, and demanded a return and cancellation of his said note, but defendants refused to receive said stock or return said note.

Wherefore, plaintiff prays that his said subscription to said stock may be annulled and said note may be ordered to be returned to him, or ordered canceled, and for all other proper relief. [Signature.]

371.—By vendee to rescind sale of real estate for want of title in vendor.

[Caption and commencement.]

That on the — day of —, 18—, the plaintiff purchased from the defendant, for the sum of — dollars, the following real estate in the county of —, State of Indiana [*describe it*], and paid him the sum of — dollars, and executed his notes for the balance of said purchase-money for — dollars each, payable in —, —, and — years respectively, with interest from date.

That defendant falsely and fraudulently represented to plaintiff that he was the owner of said real estate in fee-simple, and in consideration of the payment of said sum, and the giving of said notes, covenanted and agreed that he would, on the — day of —, 18—, by a good and sufficient warranty deed, convey to plaintiff said real estate in fee-simple.

That plaintiff, having no knowledge of any defect or want of title of defendant, on the — day of —, 18—, entered into possession

of said real estate under said contract, and held possession of the same until the — day of —, 18—.

That on the — day of —, 18—, plaintiff demanded of defendant a conveyance of said real estate, which was refused.

That defendant had no title to said real estate when plaintiff purchased the same, and has not now [or, defendant was not the owner of said real estate in fee-simple, but held only a reversionary interest therein, one — being the owner of a life estate therein, and on the — day of —, 18—, said —, by an action in the circuit court, evicted the plaintiff from said premises, and he has not since had possession thereof].

That none of plaintiff's notes to the defendant are due, and on the — day of —, 18—, plaintiff first discovered that defendant was not the owner [in fee-simple] of said real estate, and immediately [or, on the — day of —, 18—] tendered to defendant the rents and profits of said real estate for the time he had occupied the same, and demanded a return and cancellation of said notes and the payment of said sum of — dollars, paid in cash, but defendant refused to pay the same or return or cancel said notes.

Wherefore, plaintiff asks that the defendant be ordered to return said notes to plaintiff; that the same be declared canceled; that plaintiff have judgment for the said sum of — dollars paid defendant, and interest thereon, and for all other proper relief. [Signature.]

1. When rescission may be had for fraud--Necessary allegations. *Gatling v. Newell*, 12 Ind. 118; *Roy v. Haviland*, 12 Ind. 364; *Kertz v. Dunlap*, 13 Ind. 277; *Bales v. Weddle*, 14 Ind. 349; *Mattock v. Todd*, 19 Ind. 130; *Patten v. Stewart*, 24 Ind. 332; *Wambaugh v. Bimer*, 25 Ind. 368; *Sieveling v. Litzler*, 31 Ind. 13; *Mendenhall v. Treadway*, 44 Ind. 131; *Dinwiddie v. Kelley*, 46 Ind. 392; *Leeds v. Boyer*, 59 Ind. 289; *Norris v. Thorp*, 65 Ind. 47; *The Watson Coal Co. v. Casteel*, 68 Ind. 476; *Burt v. Bowles*, 69 Ind. 1; *Colson v. Smith*, 9 Ind. 8; *Brower v. Goodyear*, 88 Ind. 572; *Shuee v. Shuee*, 100 Ind. 477; *Gardner v. Fisher*, 87 Ind. 369.

2. As against subsequent purchaser without notice. *Bell v. Caferty*, 21 Ind. 411; *Mendenhall v. Treadway*, 44 Ind. 131.

3. Tender of consideration, when necessary. *Parks v. The Evansville, etc., R. R. Co.*, 23 Ind. 567; *Patten v. Stewart*, 24 Ind. 332; *Heaton v. Knowlton*, 53 Ind. 357; *The Watson Coal Co. v. Casteel*, 68 Ind. 476; *Shuee v. Shuee*, 100 Ind. 477; *Burgett v. Teal*, 91 Ind. 260.

4. Diligence—When suit must be brought. The plaintiff must show due diligence in bringing the action. If suit is not promptly brought, facts must be alleged showing a sufficient excuse for the delay. *Parks v. The Evansville, etc., R. R. Co.*, 23 Ind. 567; *Patten v. Stewart*, 24 Ind. 332; *Mattock v. Todd*, 25 Ind. 128; *The Watson Coal Co. v. Casteel*, 68 Ind. 476; *Harper v. Terry*, 70 Ind. 264; *Hunt v. Blanton*, 89 Ind. 38.

This doctrine does not apply where the contract is shown to be void. *The Union, etc., Ins. Co. v. Thomas*, 46 Ind. 44.

5. Tender of reconveyance by vendee, when necessary. *Patten v. Stewart*, 24 Ind. 332; *De Ford v. Urbain*, 48 Ind. 219; *Buell v. Tate*, 7 Blkf. 55.

6. Sale of personal property, when may be rescinded. *Gregory v. Schoenell*, 55 Ind. 101; *Moral School Township v. Harrison*, 74 Ind. 93.

7. Where contract is void. *Burt v. Bowles*, 69 Ind. 1; *The Union, etc., Ins. Co. v. Thomas*, 46 Ind. 44.

8. Rents and profits must be tendered. *Hanna v. Shields*, 34 Ind. 84; *Axtel v. Chase*, 77 Ind. 74.

9. Parties must be placed in statu quo. There can be no rescission of a contract if the parties can not be placed in *statu quo*, and if it appears on the face of the complaint that this can not be done the complaint is bad. *Fisher v. Wilson*, 18 Ind. 133; *McGuire v. Callahan*, 19 Ind. 128; *Patten v. Stewart*, 24 Ind. 332; *Stewart v. Ludwick*, 29 Ind. 230; *Hanna v. Shields*, 34 Ind. 84; *Worley v. Moore*, 97 Ind. 15.

As to what is meant by placing the defendant in *statu quo*, see *Gatting v. Newell*, 9 Ind. 572.

10. Can not be rescinded in part. A party seeking to rescind can not treat the contract as good in part and bad in part, but must affirm or avoid it as a whole. *McGuire v. Callahan*, 19 Ind. 128; *Worley v. Moore*, 97 Ind. 15.

11. Breach of warranty not ground for rescission. *Hoover v. Sidener*, 98 Ind. 290.

See ANSWER, p. 544; FRAUD, p. 367.

REVIEW.

See JUDGMENTS, p. 183.

SALES AND EXECUTORY CONTRACTS TO DELIVER.

SECTION LXXXIII.

ACTIONS BY SELLER.

372.—For non-payment.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff sold and delivered to defendant a — [*state what*], for the price of — dollars, then agreed to be paid therefor by defendant on or before the — day of —, 18— [*or, within a reasonable time thereafter, which period has elapsed*].

That said sum is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

373.—No price agreed on.

For which defendant agreed to pay plaintiff as much as said property was reasonably worth.

That said property was reasonably worth — dollars.

374.—Delivery to third person.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff sold to defendant, and, at defendant's request, delivered to —, the following goods, to-wit: [*conclude, as in Form 372*].

375.—For not receiving and paying.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff sold to defendant a — [*state what*] for — dollars, to be paid by defendant to plaintiff — dollars in cash and — dollars on the delivery thereof at —, on the — day of —, 18—.

That defendant, when said contract was made, paid plaintiff said sum of — dollars, in part payment therefor.

That plaintiff was, on the — day of —, 18— [*the day stipulated for delivery*], ready and willing to deliver said —, and on said day,

at — [stipulated place of delivery], duly tendered the same to defendant [or, had said — at — (stipulated place of delivery) during the whole of said — day of —, 18— (day stipulated for delivery), and was, during said time, ready and willing to deliver the same to defendant, but he was not there to receive the same].

That defendant refused to accept and pay for said property, pursuant to said agreement, to plaintiff's damage — dollars, for which he demands judgment. [Signature.]

1. Necessary allegations. Kirkpatrick v. Alexander, 44 Ind. 595; Lavimore v. Hornbaker, 21 Ind. 430; Kirkpatrick v. Alexander, 60 Ind. 95; Krohn v. Bantz, 68 Ind. 277; Johnson v. Powell, 9 Ind. 566; Fell v. Muller, 78 Ind. 507; Dwiggins v. Clark, 94 Ind. 49.

2. When contract must be in writing. R. S. 1881, § 4910; Smith v. Smith, 8 Blkf. 208; Krohn v. Bantz, 68 Ind. 277.

3. Measure of damages. Fell v. Muller, 78 Ind. 507; Dwiggins v. Clark, 94 Ind. 49.

376.—On purchase on trial.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff, at defendant's request, agreed to deliver to defendant a certain horse of plaintiff's, of the value of — dollars, to be used on trial by defendant, and defendant, in consideration of the premises, agreed to return said horse to plaintiff by —, or to pay him said sum of — dollars.

That plaintiff thereupon delivered said horse to defendant, to be so used on trial.

That defendant did not return said horse to plaintiff by —, nor has he paid any part of said sum for the same.

That said sum of — dollars is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

377.—On refusal to give bill or note.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff [sold to defendant] agreed with defendant to furnish and deliver to defendant — tons of —, at — dollars per ton, and defendant then promised to pay plaintiff therefor, by a bill of exchange, drawn at — days from date [or, to give plaintiff therefor his promissory note, payable at the — Bank, at —, Indiana, — days after date, for — dollars, with — per cent interest from date].

That on the — day of —, 18—, plaintiff delivered said quantity of — to defendant, and on the — day of —, 18— [or, if no time fixed, in a reasonable time thereafter], demanded of defendant

such bill [note] for the price of said —, but defendant has not given plaintiff a bill [note], or paid for said —.

That there is now due the plaintiff from defendant for said —, and unpaid, the sum of — dollars, for which he demands judgment.

[Signature.]

378.—For deficiency on re-sale.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff offered at public auction the following articles [*enumerate them*], subject to the condition that all goods not paid for by the buyer within — days after the sale should be resold by auction on his account, the expense of such re-sale, and any deficiency in the price, to be paid by such purchaser, of which the defendant then had due notice.

That defendant was the highest bidder at said sale, and was declared to be the purchaser of said goods, subject to the terms of sale, for — dollars, and then signed the following memoranda of said sale. [*Set out the written memoranda.*]

That plaintiff has duly performed all the conditions on his part to be performed, and was ready and willing to deliver said articles to defendant, and on the — day of —, 18—, the defendant, not having taken away or removed said goods, nor paid for the same [after due notice to defendant of the time and place of sale], resold said property at public auction for — dollars.

That the expense of such sale amounted to — dollars, and the deficiency thereon amounted to — dollars, which sums are now due to plaintiff and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[Signature.]

See SHERIFFS, p. 290.

379.—For not giving security agreed on.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff caused to be put up and exposed for sale by public auction a certain —, subject to the following terms: That the highest bidder should be purchaser, and should be allowed — months' credit for payment, after giving such security as should be approved by —, or should, at his election, pay down the price at the time of the sale, and in that event — per cent should be deducted from the purchase-money by way of discount, of all of which premises defendant, at the time of sale, had due notice.

That defendant was the highest bidder at said sale, and was declared to be the purchaser of said —, subject to the terms of sale,

for — dollars, and plaintiff then delivered said — to defendant [and has always been ready to perform said contract on his part].

That defendant has not paid any part of said sum of — dollars, or given or offered any security therefor, and the same is now due and unpaid.

Wherefore, plaintiff asks judgment for — dollars.

[Signature.]

1. When written memorandum of sale, delivery or part payment necessary. R. S. 1881, § 4910; *Smith v. Smith*, 8 Blkf. 208; *Krohn v. Bantz*, 68 Ind. 277; *Hudnut v. Weir*, 100 Ind. 501; *Henline v. Hall*, 4 Ind. 189; *Hansman v. Nye*, 62 Ind. 485.

See SHERIFFS, p. 290.

SECTION LXXXIV.

ACTION BY PURCHASER.

380.—For non-delivery.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff and defendant entered into an agreement, a copy of which is filed herewith, and made a part of this complaint, whereby defendant agreed to furnish to plaintiff the goods therein named, and to deliver the same at —, beginning on or before the — day of —, 18—, and continuing at not less than — per week until delivered, and plaintiff agreed to pay defendant for the same at the rate of —, to be paid in installments on delivery of said goods.

That plaintiff has duly performed all the conditions of said contract on his part to be performed, and on said — day of —, 18—, at —, and thereafter, plaintiff was ready and willing to receive and pay for said goods.

[If no time nor place of delivery are fixed by the contract, say: On the — day of —, 18—, plaintiff was ready and willing to receive and pay for and duly offered to defendant to receive and pay for said goods.]

That defendant did not then or at any time deliver said goods or any of them to plaintiff.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[Signature.]

[Copy of contract.]

See COMPLAINTS ON CONTRACTS, p. 179.

381.—Non-delivery of part.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, being the owner of a certain growing crop of grapes at —, agreed with plaintiff to gather and deliver the same to plaintiff at —, without delay, at the price of — dollars per stand, each stand to contain two bushels, said crop being estimated to amount to three hundred bushels of grapes, and there was of said grapes the quantity alleged, plaintiff to pay the sum of — dollars as earnest, and to pay for the same as they were delivered.

That plaintiff on said day paid said sum of — dollars as earnest.

That defendant, under said agreement, did commence to gather and deliver said crop to plaintiff, and continued until he delivered — stands thereof, and received from plaintiff his pay therefor on delivery, but defendant thereafter failed and refused to deliver the remainder of said crop, although plaintiff was ready and willing and offered the defendant to receive and pay for the same.

That, by reason of the premises, plaintiff has lost the profit which he otherwise would have derived from the sale of said grapes, and — dollars expense incurred in preparation to receive and ship the same.

[*Aver any other special damage.*]

To his damage — dollars, for which he demands judgment.

[*Signature.*]

382.—Where goods were bought on credit at public auction.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant offered at public auction the following property [*describe it*], on the following terms, to wit: the purchaser to give his note for the purchase-money, payable — months after date, with interest at — per cent per annum, with good personal security.

That the plaintiff was the highest bidder for said property, and became the purchaser thereof for — dollars, and tendered the defendant a note for said sum, payable in — months, with — per cent per annum interest, with — and — as sureties thereon, who were good and solvent sureties [*or, tendered the defendant said sum of — dollars, and the further sum of — dollars, the interest thereon for said — months*], and performed all of the conditions on his part to be performed, but the defendant refused to accept said note [*sum of money*] or to deliver said property.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

1. What must be tendered by the purchaser. It is not enough, in order to pass the title, for the purchaser to tender the amount of his bid in money. He must tender the note, with security, or the amount in money, *with the interest added*, for the time the note is to run. *Wainscott v. Smith*, 68 Ind. 312.

As to his right to recover damages for the violation of the executory agreement to deliver, see *Benj. on Sales* (4th Am. ed.), 1119; *Indianapolis, etc., Ry. Co. v. Maguire*, 62 Ind. 140.

2. Is within the statute of frauds. A sale at public auction is within the statute of frauds. Therefore, if the purchase price is above the amount fixed by the statute, there must be a delivery, part payment, or a written memorandum of the sale, signed by the party to be charged. *Benj. on Sales* (4th Am. ed.), 128.

See *SHERIFFS*, p. 290.

383.—Sale of good-will agreement not to compete.

[*Caption and commencement.*]

That on the — day of —, 18—, the defendant, then carrying on the business of —, at No. —, in — street, in —, in consideration that plaintiff would purchase his store and goods, and the good-will of his said business, for — dollars, agreed with plaintiff that he would not, at any time thereafter, carry on said business at any place within said city [*or, within a radius of — miles of said store*], a copy of which agreement is filed herewith, and made a part of this complaint.

That, in pursuance of said agreement, plaintiff bought of defendant his said store and stock of goods and good-will, on the terms aforesaid, and paid him said sum of — dollars therefor.

That plaintiff has duly performed all of the conditions of said contract on his part to be performed.

That defendant afterward, on the — day of —, 18—, engaged in, and still continues, the business of —, at —, and thereby competes with plaintiff, and prevents the establishment of his business, and greatly reduces his profits.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

[*Copy of contract.*]

1. See *Lewis v. Christie*, 99 Ind. 377.

For further forms applicable to contracts of sale, see *ACCOUNTS*, p. 12; *CONTRACTS*, p. 130.

1. Earnest or part payment, what will amount to. *Noakes v. Morey* 30 Ind. 103; *Baker v. Farmbrough*, 43 Ind. 240; *Hudnut v. Weir*, 100 Ind. 501.

2. Earnest money may be recovered back as damages. *Gossard v. Woods*, 98 Ind. 195.

3. Demand for delivery, when necessary. *Cook v. Gray*, 6 Ind. 335.

4. Tender of payment, when and where must be made. *Sherry v. Picken*, 10 Ind. 375; *Bradley v. Michael*, 1 Ind. 551.

5. Tender or delivery of property, what sufficient. *Murphy v. Toner*, 19 Ind. 223; *Shipp v. Bowen*, 25 Ind. 44; *Hausman v. Nye*, 62 Ind. 485; *Moral School Tp. v. Harrison*, 74 Ind. 93; *Kirkpatrick v. Alexander*, 60 Ind. 95.

6. What necessary to pass title. *Straus v. Ross*, 25 Ind. 300; *Hollingsworth v. Bates*, 3 Bkfst. 340; *Pierce v. Gibson*, 2 Ind. 408; *Henline v. Hall*, 4 Ind. 189; *Wright v. Maxwell*, 9 Ind. 192; *Sherry v. Picken*, 10 Ind. 375; *Cloud v. Moorin*, 18 Ind. 40; *Rich v. Johnson*, 61 Ind. 246; *Indianapolis, etc., Ry. Co. v. Maguire*, 62 Ind. 140; *Bertelson v. Bower*, 81 Ind. 512; *Dixon v. Duke*, 85 Ind. 434; *The Com. Nat. Bank v. Gillette*, 90 Ind. 268; *Dwiggins v. Clark*, 94 Ind. 49; *Curme v. Rauh*, 100 Ind. 247.

SECTION LXXXV.

SEDUCTION.

384.—By unmarried female for her own seduction.

[*Caption and commencement.*]

That the plaintiff is now, and always has been, an unmarried female.

That on the — day of —, 18—, defendant being also unmarried, commenced paying his attentions to plaintiff, and thereafter until the — day of —, 18—, continued his visits and attentions at various times, expressing his love and affection for plaintiff, and promising to marry her, whereby he gained her confidence and affection.

That on said — day of —, 18—, the defendant solicited and importuned her to sexual intercourse with him, and to induce her to submit to his embraces again promised to make her his wife, whereby and by reason of her love and affection for the defendant she was induced to and did have sexual intercourse with him on said day and at various times thereafter.

That, by reason of said intercourse, she became sick and pregnant with child, whereby she was for — months rendered unable to work, and was, on the — day of —, 18—, delivered of a child, and suffered great pain and suffering of body and mind, and was compelled to pay out the sum of — dollars for medical attendance during her sickness, and — dollars for nursing and other expenses.

Whereby the plaintiff has been damaged in the sum of — dollars, for which she demands judgment.

[*Signature.*]

1. Necessary allegations. Ante, vol. 1, §§ 85, 364; *Smith v. Yaryan*, 69 Ind. 445; *Rees v. Cupp*, 59 Ind. 566; *Thompson v. Young*, 51 Ind. 599; *Galvin v. Crouch*, 65 Ind. 56; *Dowling v. Crapo*, 65 Ind. 209; *Bell v. Rinker*, 29 Ind. 267; *Hart v. Walker*, 77 Ind. 331; *Wilson v. Ensworth*, 85 Ind. 399; *Wilson v. Shepler*, 86 Ind. 275; *Haymond v. Saucer*, 84 Ind. 3; *Hodges v. Bales*, 102 Ind. 494.

2. What amounts to seduction. *Hill v. Wilson*, 8 Blkf. 123; *Bell v. Rinker*, 29 Ind. 267; *Smith v. Yaryun*, 69 Ind. 445; *Johnson v. Holliday*, 79 Ind. 151; *Haymond v. Saucer*, 84 Ind. 3; *Ireland v. Emmerson*, 93 Ind. 1.

3. Measure of damages. *Wilson v. Shepler*, 86 Ind. 275; *Haymond v. Saucer*, 84 Ind. 3.

4. Who may sue for seduction. Ante, vol. 1, §§ 82, 85.

5. Joinder of causes. Actions for breach of promise and for seduction may be joined *Haymond v. Saucer*, 84 Ind. 3.

See CRIM. CON., p. 143.

SERVICES.

See ACCOUNT, p. 12; CONTRACT, p. 128; SEDUCTION, p. 289; INFANTS, p. 166.

SECTION LXXXVI.

SHERIFFS.

385.—Neglect to return writ.

[*Caption and commencement.*]

That at the time of the grievances hereinafter mentioned defendant was the sheriff of — county, State of Indiana.

That on the — day of —, 18—, by the consideration of the — Circuit Court, plaintiff recovered a judgment against one — for — dollars and — dollars costs.*

That on the — day of —, 18—, an execution was duly issued on said judgment, and delivered to the defendant, as sheriff of said county, commanding him to make, of the goods and chattels of said —, the said sum of — dollars damages and — dollars costs, and accruing costs, and for want of goods and chattels that he cause the same to be made of the lands and tenements of said —, and that he return said execution within — days from the date thereof.**

That although more than — days have elapsed from the date of said writ, yet defendant has, in violation of his duty as such sheriff, failed to make return of the same.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

1. Duty and liability of sheriff as to making return. See Form 126, p. 86, and authorities cited in notes, ante, vol. 2, §§ 1184, 1185.

386.—Non-payment of money made.

[*Follow Form 385 to ***, and continue]. That defendant afterward, and before the return of said writ, on the — day of —, 18—, levied and took in execution divers of the goods and chattels of said —, of the value of the moneys ordered to be levied as aforesaid.

That defendant has failed and neglected to have any part of the money so levied before said court at the return day thereof, or to pay the same, or any part thereof, to plaintiff or into court, although the plaintiff, on the — day of —, 18—, demanded of the defendant the payment of said amount.

See Form 129, p. 87, and notes.

387.—Neglect to levy.

[*Follow Form 385 to ***, and continue]. That said —, at the time of the delivery of said writ to defendant, and afterward, had divers goods and chattels, lands and tenements, within defendant's bailiwick, out of which said execution might have been satisfied; yet defendant, disregarding his duty as such sheriff, not being in any way directed by the plaintiff or his agent or attorney, neglected and failed to make any levy thereunder,* and said — has since become insolvent, whereby plaintiff has been deprived of the means of obtaining the money so directed to be made, to his damage — dollars, for which he demands judgment.

1. Necessary allegations. See Form 125, p. 84, and notes; vol. 2, §§ 1149–1156; *The State v. Emmons*, 88 Ind. 279.

388.—False return.

[*Follow Form 387 to **, and continue]. And falsely returned upon said execution that said — had no goods and chattels, lands or tenements, within said county whereon to levy the amount of said judgment or any part thereof, and said — has since become, and still is, wholly insolvent.

Whereby plaintiff has lost his remedy against said —, and has been damaged in the sum of — dollars, for which he demands judgment.

See Form 127, p. 87, ante, vol. 2, § 1187.

389.—Failure to sell or leaving property with debtor.

[*Follow Form 385 to **, and continue*]. That on the — day of —, 18—, said sheriff, by virtue of said writ, levied on the goods and chattels of said —, of sufficient value to pay plaintiff's claim [*or, of the value of — dollars*], but neglected to advertise and sell the same, and no part of the money directed to be made on said execution has been received by plaintiff [*or, left said property in the custody of said —, and thereupon advertised said property for sale under said execution, but said — did not produce said property at the time set for said sale, and the same could not be found, and was not sold by defendant*].

Whereby, etc.

1. Effect of levy as a satisfaction of the debt. Ante, vol. 1, § 1060; *Harmon v. The State*, 82 Ind. 197.

390.—Permitting escape on order of arrest—False return.

[*Caption and commencement.*]

That at the times hereinafter stated, the defendant was the sheriff of — county, State of Indiana.

That on the — day of —, 18— [*the date of the order of arrest*], one — was indebted to plaintiff in the sum of — dollars, upon a certain cause of action, before then accrued to the plaintiff; and an action by this plaintiff against the said — to recover the same was theretofore commenced and was then pending in the — Circuit Court; and for the recovery of said debt the plaintiff, on that day, filed his affidavit therefor with the clerk of said court, and procured to issue out of said clerk's office an order of arrest, directed to the sheriff of said county, by which order said sheriff was commanded to [*recite the command in the order of arrest*].

That said order of arrest was on said day delivered to the defendant, to be executed by him as such sheriff.

That defendant afterward, on the same day, in said county, arrested the said —, and had him in custody for the cause aforesaid; and afterward, on the same day, the plaintiff not being paid any part of said sum of money due to him, the defendant, without the license of the plaintiff, or any legal authority whatsoever [*voluntarily*], wrongfully and negligently permitted and suffered the said — to escape out of his said custody, and to go at large.

That defendant also, as such sheriff, at the return of said order, falsely and wrongfully returned thereon that said — was not to be

found in his county, and said — did not, at the return of said order, or at any other time, appear in the said court or give bail in the premises.

That, by reason of the premises, the plaintiff is deprived of the means of recovery of said sum of money, so due and owing to him as aforesaid, and has wholly lost the same, to his damage — dollars, for which he demands judgment. [Signature.]

391.—Escape on execution against the body.

[Follow Form 385 to *, and continue]. That on the — day of —, 18—, plaintiff filed with the clerk of said court his affidavit therefor, and procured to be duly issued an execution against the person of said — on said judgment, which was on said day delivered to defendant as such sheriff, commanding him to [state command of writ] *

That afterward, on the — day of —, 18—, defendant, pursuant to the command of said writ, arrested said — and committed him to jail, but in violation of his duty as such sheriff, and without any legal authority or license from plaintiff, negligently permitted said — to escape, whereby plaintiff has been deprived of the means of collecting his judgment.

To plaintiff's damage — dollars, for which he demands judgment. [Signature.]

392.—Neglect to arrest.

[Follow Form 391 to *, and continue]. That before the return of said writ, on the — day of —, 18—, defendant had notice that said — was within said county, and there had said — in his view and presence, and could have arrested him, but in violation of his duty as such sheriff failed to arrest said —, and willfully neglected the execution of said writ [and falsely and deceitfully returned on said order to said court that said — was not found in said county], to plaintiff's damage — dollars, for which he demands judgment.

[Signature.]

1. Liability of sheriff for escape. *Gwinn v. Hubbard*, 3 Blkf. 14; *The State v. Hamilton*, 33 Ind. 502; *Ex parte Voltz*, 37 Ind. 175.

393.—Levy on and sale of exempt property.

[Caption and commencement.]

That at the times hereinafter mentioned the defendant was the sheriff of the county of —, State of Indiana.

That on the — day of —, 18—, one — recovered a judgment in the — Circuit Court against this plaintiff for — dollars and — dollars costs, in an action upon a promissory note given by plaintiff to said —, and thereafter, on the — day of —, 18—, caused an execution to be issued thereon and placed in the hands of the defendant, commanding him to make of the goods and chattels, or for want of goods and chattels, of the lands and tenements of the plaintiff, said sum of — dollars damages and — dollars costs and accruing costs.

That on the — day of —, 18—, defendant levied said execution on the following property of plaintiff [*describe it*], of the value of — dollars.

That the plaintiff was then, and still is, a resident householder of said county, and entitled to claim the benefit of the exemption laws of this state, and on the — day of —, 18—, made out and delivered to defendant an inventory of all of his real estate within or without this state, money on hand or on deposit, within or without the state, rights, credits, and choses in action, and all personal property of every description whatever belonging to him or in which he had any interest at the date of the issuing of said writ, with an affidavit of plaintiff, made and subscribed thereto, that said inventory contained a full and true account of all such property had or held by him, or in which he had any interest at the time of issuing said writ, and thereupon demanded of defendant that said property [*or if of a greater value than six hundred dollars*, that plaintiff be allowed to select an amount of said property not exceeding the appraised value of six hundred dollars, and that the same] be set off to him as exempt.

But the defendant, disregarding his duty as such sheriff, refused [to allow plaintiff to select any part of said property as exempt or] to set off to plaintiff said property or any part of it as exempt, and on the — day of —, 18—, sold the same under said execution.

Whereby plaintiff has been damaged in the sum of — dollars, for which he demands judgment. [Signature.]

1. Necessary allegations. In this state no property is exempt from execution without some act of the execution defendant making it so. *Ante*, vol. 2, § 1162.

Therefore, the complaint must allege the facts, showing that he is a person entitled to exemption under the statute, and that he took all of the steps necessary to entitle him to have the property set off to him, in order to show a cause of action against the sheriff. *The State v. Read*, 94 Ind. 103; *Newcomer v. Alexander*, 96 Ind. 453; *Huseman v. Sims*, 4 North East Rep. 42.

But, when the necessary steps are taken by the defendant, it is the positive duty of the sheriff to set off the property, and for a failure to do so he is liable

for damages. Ante, vol. 2, § 1162; *Stephens v. Lawson*, 7 Blkf. 275; *The State v. Read*, 94 Ind. 103.

And if he refuses he may be compelled by mandamus. *Pudney v. Burkhardt*, 62 Ind. 179; *The State v. Read*, 94 Ind. 103.

The sheriff is bound by the schedule, although he may know that it does not include all of the defendant's property. Over *v. Shannon*, 91 Ind. 99.

As to what is necessary to entitle a party to exemption, and the practice generally, see ante, vol. 2, §§ 1159-1165, post, p. 344; *Astley v. Capron*, 89 Ind. 167; *Haas v. Shaw*, 91 Ind. 384; *The State v. Read*, 94 Ind. 103; *Kelley v. McFadden*, 80 Ind. 536.

The complaint need not contain the schedule. *The State v. Read*, 94 Ind. 103; *Huseman v. Sims*, 4 North East Rep. 42.

394.—By sheriff, against purchaser, for purchase-money.

[Caption and commencement.]

That at the times hereinafter mentioned the plaintiff was, and still is, sheriff of the county of —, State of Indiana.

That on the — day of —, 18—, one — recovered judgment in the — Circuit Court against one — for — dollars and — dollars costs, and thereafter caused execution to issue thereon and be delivered to the plaintiff.

That on the — day of —, 18—, plaintiff, as such sheriff, levied said execution on the following described real estate of said —, in said county, to wit [*describe it*], and gave due and legal notice of the sale thereof on the — day of —, 18—, at — o'clock P. M., by advertising the same for more than twenty days successively next before said day of sale, by posting up printed notices thereof in three of the most public places in the township in which said real estate was situated, and one at the door of the court-house of said county, and also by advertising the same for three weeks successively in the —, a newspaper of general circulation, printed in the English language, and published at —, in said county.

That on the said — day of —, 18—, at the hour named in said notice, the plaintiff, as such sheriff, offered said real estate for sale at public auction, at the court-house door in said county, and the defendant bid therefor the sum of — dollars, and that being the highest and best bid therefor the same was knocked off and sold to the defendant for said sum.

That the plaintiff then and there made the following written memorandum of said sale, to wit: [*copy it.*]*

That the plaintiff then [*or*, on the — day of —, 18—] tendered to defendant a certificate of sale for said property, and demanded the payment of said purchase-money, but no part of the same has been paid, and the whole thereof is now due.

Wherefore, the plaintiff demands judgment against defendant for said sum of — dollars and ten per cent damages and interest thereon. [Signature.]

395.—For difference in price on resale.

[Follow Form 394 to *, and continue]. That plaintiff then [or, on the — day of —, 18—] tendered defendant a certificate of sale for said property, and demanded payment of the sum bid, but he refused to pay the same or any part thereof.

That plaintiff immediately reoffered said property for sale [or, on the — day of —, 18—, again gave notice of the sale of said property on the — day of —, 18—, at — o'clock P. M., by posting notices and advertising in said newspaper for the time and in the manner of giving notice of said first sale, and on the day and hour named in said notices again offered said property for sale at public auction], and one — bid therefor the sum of — dollars, and that being the highest and best bid the same was knocked off and sold to said — for said sum, which was paid.

That the costs of said second sale amounted to the sum of — dollars.

Wherefore, plaintiff demands judgment for — dollars and ten per cent damages and interest thereon. [Signature.]

1. Necessary allegations. The statute provides for a proceeding by *motion* to recover the purchase-money or the difference in price on a resale. R. S. 1881, §§ 760, 761; ante, vol. 2, § 1173.

But the same may be done by complaint, which would seem to be the better practice. In order to recover, the complaint must show a valid sale. The purchaser can not be compelled to pay the purchase-money if the sale passed no title. But mere defects in the judgment defendant's title will not release the purchaser. Ante, vol. 2, § 1173.

The sale is within the statute of frauds, and there must be a sufficient written memorandum of the sale, as in other cases. Ante, vol. 2, § 1173.

See BONDS AND UNDERTAKINGS, pp. 84-87; INDEMNITY, p. 165; SALES, p. 283.

SECTION LXXXVII.

SPECIFIC PERFORMANCE.

396.—General form.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant entered into a written agreement, a copy of which is filed herewith, and made a part of this complaint.

That the plaintiff has duly performed all of the conditions of said contract on his part to be performed.

That the defendant has failed to comply with the conditions thereof in this [*state the breaches particularly*].

Wherefore, plaintiff prays that the defendant be required to perform said contract on his part, and for all other proper relief.

[*Copy of agreement.*]

[*Signature.*]

397.—Vendee against vendor.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant being the owner in fee of the following real estate in the county of —, State of — [*describe it*], by a contract, a copy of which is filed herewith, and made a part of this complaint, promised, in consideration of the sum of — dollars, to be paid him by plaintiff, — dollars cash in hand, and the balance in equal annual installments, at — per cent interest, secured by mortgage on the premises, to convey said premises to plaintiff by a good and sufficient warranty deed.

That plaintiff duly performed all of the conditions of said contract on his part, and on the — day of —, 18—, tendered to defendant said sum of — dollars, and was ready and willing and offered to execute notes for said deferred payments, and a mortgage on said premises to secure the same and demanded a conveyance of the same to him, but defendant then and ever since has refused to execute and deliver such conveyance.

That plaintiff is still ready and willing to pay said purchase-money and execute said notes and mortgage, and now brings the same into court for the use of the defendant.

Wherefore, plaintiff asks that defendant be required to convey said premises to plaintiff by warranty deed. [Signature.]

[Copy of contract.]

398.—Against heirs and representatives of deceased vendor.

[Caption and commencement.]

That on the — day of —, 18—, one —, now deceased, being the owner in fee of the following real estate in the county of —, State of Indiana [*describe it*], entered into an agreement, a copy of which is filed herewith, and made a part of this complaint, whereby he agreed, in consideration of — dollars, to be paid him by plaintiff, as follows [*state terms*], to convey said property to plaintiff by a deed of general warranty in fee, said deed to be executed when plaintiff should have paid the sum of — dollars.

That on the — day of —, 18—, said — died intestate, leaving the defendant, —, his widow, and the defendants, — and —, his only children and heirs at law, and letters of administration on his estate were duly issued by the — Circuit Court on the — day of —, 18—, to the defendant, —, who thereupon duly qualified, and is still acting as administrator thereof.

That on the — day of —, 18—, plaintiff paid [tendered] to said —, as such administrator, said sum of — dollars, and on said day demanded a deed from him and from the defendants, —, — and —, but they refused to give the same.

That plaintiff has been at all times since the same fell due, and is now, ready and willing to pay defendants the balance in full of said purchase-money, and now brings the same into court for their use.

Wherefore, the plaintiff prays the court that said defendants, —, —, and —, who are the owners of the legal title to said real estate, be required to execute to the plaintiff a warranty deed therefor, and that upon their failure so to do that a commissioner be appointed and ordered to make such conveyance, and for all other proper relief.

[Copy of agreement.]

[Signature.]

1. Necessary allegations. *Butler v. Holtzman*, 55 Ind. 125.

. 399.—Allegation against subsequent vendee.

The defendant, — [*the vendor*], pretends that he has sold and conveyed said premises to the defendant, —, for a valuable consideration, but plaintiff avers that said defendant paid no consideration

therefor [or, said defendant well knew of all the rights of plaintiff at the time he received said conveyance and paid his money thereon].

400.—Verbal contract—Part performance.

[Caption and commencement.]

That on the — day of —, 18—, the defendant, being the owner in fee of the following real estate in the county of —, State of — [describe it], made an agreement, whereby he promised, in consideration of — dollars, to be paid him by plaintiff, — dollars cash in hand, and the balance in equal annual installments, at — per cent interest, to convey said premises to plaintiff by a good and sufficient warranty deed, the plaintiff to take possession thereof upon making the cash payment.

That plaintiff paid said cash payment on said day [or, on the — day of —, 18—], and immediately took, and has ever since held possession of said premises under said contract, with the knowledge and consent of the defendant, and has erected a dwelling-house and out-houses, put out trees, and made other and lasting improvements thereon.

That plaintiff has fully performed all of the conditions of said contract on his part to be performed, and on the — day of —, 18—, when said last installment of purchase-money became due, paid [tendered] the same, with the accrued interest thereon, but the defendant refused to [accept the same or to] execute said deed, and ever since has refused to execute the same.

That plaintiff was, when the same fell due, and still is, ready and willing to pay the balance of said purchase-money, and now brings the same into court for the use of defendant.

Wherefore, the plaintiff prays that the defendant be required to execute said deed, and for all other proper relief. [Signature.]

1. What sufficient allegation to take contract out of the statute of frauds. The complaint must allege and set out a written contract or sufficient facts to take the contract out of the statute. *Tibbs v. Barker*, 1 Blkf. 58; *Law v. Henry*, 39 Ind. 414.

As to what will amount to a sufficient allegation of part performance, see *Moore v. Higbee*, 45 Ind. 487; *Judy v. Gilbert*, 77 Ind. 96; *Mather v. Scales*, 35 Ind. 1; *Drum v. Stevens*, 94 Ind. 181; *Stater v. Hill*, 10 Ind. 176; *Hixon v. Cuppy*, 33 Ind. 210; *Pearson v. East*, 36 Ind. 27; *Law v. Henry*, 39 Ind. 414; *Lafollett v. Kyle*, 51 Ind. 446; *Melton v. Coffelt*, 59 Ind. 310; *Fall v. Hazelrig*, 45 Ind. 576.

2. Necessary allegations generally. *Moore v. Higbee*, 45 Ind. 487;

Vawter v. Bacon, 89 Ind. 565; Drum v. Stevens, 94 Ind. 181; Harless v. Petty, 98 Ind. 53; Hauser v. Roth, 37 Ind. 89; Gigos v. Cochran, 54 Ind. 593.

3. Demand for deed, when necessary to be alleged. Sheets v. Andrews, 2 Blkf. 274; Brown v. Hart, 7 Blkf. 429; Mather v. Scales, 35 Ind. 1; Vawter v. Bacon, 89 Ind. 565; Harless v. Petty, 84 Ind. 269; West v. Chase, 3 Ind. 301.

Where an excuse for a failure to demand a deed exists, the facts showing the excuse must be set out. Ante, vol. 1, § 395; Blann v. Smith, 4 Blkf. 517; Bowen v. Jackson, 8 Blkf. 203; West v. Chase, 3 Ind. 301.

4. Performance by plaintiff, how alleged. Ante, vol. 1, § 394; Hauser v. Roth, 37 Ind. 89; Vawter v. Bacon, 89 Ind. 565.

5. Parties. As to who are proper parties in actions by vendees for specific performance, see ante, vol. 1, § 132.

6. Tender of purchase-money or excuse for want of, how alleged. Ante, vol. 1, § 395; Parker v. McAlister, 14 Ind. 12; Hunter v. Bales, 24 Ind. 299; Lynch v. Jennings, 43 Ind. 276; Fall v. Hazelrig, 45 Ind. 576.

401.—Vendor against purchaser.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff, being the owner in fee of the following real estate in the county of —, State of — [describe it], by a written agreement, a copy of which is filed herewith, and made a part of this complaint, agreed to sell and convey the same to defendant in fee-simple, by warranty deed, in which his wife should join, in consideration of which it was agreed by defendant as a part of said contract that he would buy said real estate and pay the plaintiff therefor the sum of — dollars, payable one-third cash in hand and the balance in two equal annual installments, bearing — per cent interest, defendant to execute his notes for said deferred payments, secured by defendant's mortgage on said premises.

That plaintiff has duly performed all the conditions of said agreement on his part to be performed, and on the — day of —, 18—, tendered to defendant a deed in fee-simple of said premises, duly executed and acknowledged by plaintiff and his wife, with covenants of general warranty, and demanded of defendant the payment of said cash payment and the execution of said notes and mortgage for the deferred payments.

That defendant refused, and still refuses, to pay said money or execute said notes and mortgage.

That plaintiff is still willing to comply with said contract and to deliver said deed, and now brings the same into court for the use of the defendant.

Wherefore, plaintiff asks that defendant be required to specifically

perform said agreement, and pay plaintiff said sum of — dollars and execute said notes and mortgage, and for all other proper relief.

[*Copy of agreement.*]

[*Signature.*]

402.—Agreement to make lease.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant, being the owner in fee of the following real estate in the county of —, State of — [*describe it*], duly executed an agreement with plaintiff, a copy of which is filed herewith and made a part of this complaint, whereby he agreed to lease the same, with the appurtenances, to plaintiff, for the term of — years from —, on the conditions named in said agreement.

That plaintiff, in reliance on said agreement, has expended the sum of — dollars in improving said premises in this [*state what*].

That plaintiff has duly performed all of the conditions of said agreement on his part to be performed, and has always been ready and willing, and still is, to accept a lease of said premises, but defendant has failed and refused, and still refuses, to execute a lease to plaintiff.

Wherefore, plaintiff prays that defendant be required to execute to plaintiff a lease, in accordance with the terms of said agreement, and for all other proper relief.

[*Signature.*]

[*Copy of agreement.*]

1. What contracts will be specifically enforced. *Modisett v. Johnson*, 2 Blkf. 431; *Chamberlain v. Blue*, 6 Blkf. 491; *Ash v. Daggy*, 6 Ind. 259; *Stater v. Hill*, 10 Ind. 176; *Kirkman v. Kenyon*, 17 Ind. 607; *Swihart v. Cline*, 19 Ind. 264; *Watson v. Mahan*, 20 Ind. 223; *Sterling v. Klepsattle*, 24 Ind. 94; *Hunter v. Bales*, 24 Ind. 299; *Cincinnati, etc., R. R. Co. v. Washburn*, 25 Ind. 259; *Walker v. Cox*, 25 Ind. 271; *Columbus, etc., R. R. Co. v. Watson*, 26 Ind. 50; *Pearson v. East*, 36 Ind. 27; *Church v. Cole*, 36 Ind. 34; *Teague v. Fowler*, 56 Ind. 569; *Johnson v. Hoover*, 72 Ind. 395; *Smith v. Turner*, 50 Ind. 367; *Fall v. Hazelrig*, 45 Ind. 576; *Butler v. Holtzman*, 55 Ind. 125; *Harless v. Petty*, 98 Ind. 53.

2. Tender, what sufficient. *Brewer v. Thorp*, 3 Ind. 262; *Keller v. Fisher*, 7 Ind. 718; *Parker v. McAlester*, 14 Ind. 12; *Hunter v. Bales*, 24 Ind. 299.

3. Description of property in contract, what sufficient. As to what will constitute a sufficient description in cases of specific performance, and to what extent a defective description may be aided by the allegation of extrinsic facts, see ante, vol. 1, § 392; *Miller v. Campbell*, 52 Ind. 125; *Gigos v. Cochran*, 54 Ind. 593; *Newman v. Perrill*, 73 Ind. 153.

4. Consideration. To authorize the specific enforcement of a contract, it must be shown to have been upon a *valuable*, as distinguished from a *good*, consideration. *Allen v. Davison*, 16 Ind. 416.

A mere, voluntary, executory contract can not be specifically enforced. *Randall v. Ghent*, 19 Ind. 271.

And the consideration must be adequate. *Watson v. Mahan*, 20 Ind. 223.

As to what will amount to a sufficient consideration, see *Lafollett v. Kyle*, 51 Ind. 446.

5. When action must be brought. The question as to the time of bringing the action is not controlled entirely by the statute of limitations. The action must be brought within a reasonable time, or the delay excused by the proper averments, or the relief may be denied on that ground alone. *Bennett v. Welch*, 25 Ind. 140.

6. Action, where commenced. Ante, vol. 1, § 180.

7. Tender of deed. In an action by the vendor, where the execution of the deed must precede the payment of the purchase-money, a tender of the deed should be alleged, and the complaint should contain an offer to bring into court and deliver the deed upon a decree for specific performance being rendered. *Melton v. Coffelt*, 59 Ind. 310; *Sowle v. Holdridge*, 63 Ind. 213.

SECTION LXXXVIII.

STOCKHOLDERS.

403.—Against stockholders for debt of corporation.

[*Caption and commencement.*]

That the — Company is a corporation duly organized and doing business under the general laws of the State of Indiana as [*state the business of the corporation*].

That said corporation, on the — day of —, 18—, by its promissory note, a copy of which is filed herewith, and made a part of this complaint, promised to pay plaintiff — dollars — months after date, with — per cent interest from date until paid, which note was given for [*state some consideration for which the corporation was authorized to contract*].

That said note is now due and wholly unpaid.

That said corporation has no property, real or personal, subject to execution, and is, and has been ever since the maturity of said note, wholly insolvent.

[*Or, on the — day of —, the plaintiff recovered a judgment in the — Circuit Court against said corporation for — dollars damages and — dollars costs of suit; and on the — day of —, 18—, execution was duly issued on said judgment, and was returned no property whereon to levy, and said company then had, and now*

has, no property subject to execution from which said judgment, or any part of it, could be made, and said judgment is still in full force, unpaid and unsatisfied.]

That the defendants were at the time said indebtedness [the debt on which said judgment was recovered] was incurred, and still are, the stockholders of said corporation. [*If the stockholders are made liable to the extent of their stock by statute, allege the amount of stock held by each.*]

That, by reason of the premises, the defendants are liable [to an amount equal to their stock] to plaintiff and other creditors of said corporation.

[*If any stockholders are unknown, make the corporation a party, and say: There are numerous other stockholders liable for the debts of said corporation, whose names are unknown to plaintiff, and plaintiff asks that said corporation may be compelled to disclose who are its stockholders, and set forth their names and the amount of stock held by each, and that when discovered said stockholders be made parties.*]

That said corporation is largely indebted to other creditors, but to whom and the amounts is unknown to plaintiff.

Wherefore, the plaintiff prays the court that the creditors of the company and the amount due each may be ascertained in such manner as the court may direct; that plaintiff have judgment for — dollars, and that defendants be compelled to pay into court money sufficient to pay the debts of said company [not exceeding the amount of stock held by each], and for all other proper relief. [Signature.]

[Copy of note.]

1. Liability of stockholders—Necessary allegations. Ante, vol. 1, § 130; Overmyer v. Cannon, 82 Ind. 457; Dukes v. Love, 97 Ind. 341.

2. Joinder of parties. Ante, vol. 1, § 130; Overmyer v. Cannon, 82 Ind. 457.

3. Must the company be first sued? It is held in some of the states that before the stockholder can be sued the liability of the corporation must be fixed by judgment. But under statutes of this state making the stockholders liable, it has been held that the liability is primary, and an action may be maintained without having recovered against the company. Ante, vol. 1, § 130, and cases cited.

SECTION LXXXIX.

SUBSCRIPTIONS.

404.—On subscription for a public object.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff was erecting an academy, and defendant, for the purpose of enabling plaintiff to erect said building, in consideration of the premises and of a like subscription by others subscribed and agreed to pay plaintiff the sum of — dollars, a copy of which subscription is filed herewith, and made a part of this complaint, [*or, if there were no other subscriptions, aver consideration, as follows:* Upon the faith of said subscription plaintiff proceeded with the erection of said building, and expended thereon large sums of money and incurred large liabilities].

That plaintiff has performed all the conditions of said contract on his part to be performed.

That said subscription is now due and unpaid.

Wherefore, plaintiff demands judgment for — dollars.

[*Signature.*]

[*Copy of subscription, omitting other names and amounts.*]

1. Necessary allegations. North-western Conference, etc., v. Myers, 36 Ind. 375; Higert v. The Trustees of Indiana, etc., University, 53 Ind. 326.

2. What sufficient consideration. Johnson v. The Wabash College, 2 Ind. 555; Peirce v. Ruley, 5 Ind. 69; Johnson v. The Wabash, etc., Plank-road Co., 16 Ind. 389; The North-western Conference, etc., v. Myers, 36 Ind. 375; Crown Hill, etc., Co. v. Armstrong, 39 Ind. 418; Higert v. The Trustees of Indiana, etc., University, 53 Ind. 326; Roche v. The Roanoke, etc., Seminary, 56 Ind. 198.

405.—By corporation on stock calls.

[*Caption and commencement.*]

That on the — day of —, 18—, for the purpose of constructing, owning, and maintaining a —, and in consideration of the advantages thereof and of each others' subscriptions, defendant, and other persons, became subscribers to the capital stock of the plaintiff, by severally executing an agreement, a copy of which is filed herewith, and made a part of this complaint, whereby defendant agreed to

take the number of — shares, each share being of the par value of — dollars, and agreed to pay plaintiff therefor the sum of — dollars, as required by law and the orders of the directors of plaintiff.

That on the — day of —, 18—, a board of directors was duly elected and qualified, who, with their successors, still constitute the board of directors of the plaintiff.

That afterward [*allege performance of any condition precedent in the agreement*].

That on the — day of —, 18—, defendant, still being the owner of said shares, the directors of the plaintiff, by resolution, required payment on subscriptions to stock in the sum of — dollars on each share, to be paid to one —, the treasurer of the plaintiff, at —, on or before the — day of — [*in the same way allege any other calls*], and gave notice of said call and the time and place of payment by [*state the facts showing the giving of notice, as required in the particular case*].

That no part of said sum has been paid, and the same is now due.

Wherefore, plaintiff demands judgment for — dollars.

[*Copy of subscription, omitting other names.*]

[*Signature.*]

1. Necessary allegations. As to what complaint should contain in actions for stock generally, see *Ross v. The Lafayette, etc., Ry. Co.*, 6 Ind. 297; *Smith v. The Indiana, etc., Ry. Co.*, 12 Ind. 61; *Breedlove v. The Martinsville, etc., Ry. Co.*, 12 Ind. 114; *The Ohio, Indiana, etc., Ry. Co. v. Cramer*, 23 Ind. 490; *Drover v. Evans*, 59 Ind. 454; *Fox v. The Allensville, etc., Tp. Co.*, 46 Ind. 31.

2. Notice of call, when necessary, and what sufficient. *Breedlove v. The Martinsville, etc., Ry. Co.*, 12 Ind. 114; *Andrews v. The Ohio, etc., Ry. Co.*, 14 Ind. 169; *Heaston v. The Cincinnati, etc., R. R. Co.*, 16 Ind. 275; *The New Albany, etc., Ry. Co. v. McCormick*, 10 Ind. 499; *Fox v. The Allensville, etc., Turnpike Co.*, 46 Ind. 31.

3. Call, what sufficient. *Andrews v. The Ohio, etc., Ry. Co.*, 14 Ind. 169; *Heaston v. The Cincinnati, etc., R. R. Co.*, 16 Ind. 275; *The Ohio, Indiana, etc., Ry. Co. v. Cramer*, 23 Ind. 490.

4. Demand for payment, when necessary. *The Ohio, Indiana, etc., Ry. Co. v. Cramer*, 23 Ind. 490.

5. Preliminary subscriptions. Where the subscription is preliminary to and with a view to an organization the complaint must allege the facts, showing that all of the steps necessary to such organization have been taken. *Ante*, vol. 1, § 371; *Nelson v. Blakey*, 47 Ind. 38.

6. Tender of certificate not necessary. *The New Albany, etc., Ry. Co. v. McCormick*, 10 Ind. 499; *Drover v. Evans*, 59 Ind. 454.

SECTION XC.

SUBROGATION.

406.—By joint creditor, who has been compelled to pay whole mortgage debt.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant, —, purchased from the defendant, —, for the sum of — dollars, certain real estate described in the mortgage, hereinafter set out, and executed to said defendant their three notes for said purchase-money, for — dollars each, payable in one, two, and three years thereafter, with — per cent interest, copies of which notes are filed herewith, and made a part of this complaint, and to secure the payment thereof executed their joint mortgage on said real estate, a copy of which is filed herewith, and made a part of this complaint.

That said mortgage was duly recorded in the office of the recorder of said county on the — day of —, 18—.

That thereafter plaintiff and defendant, —, agreed upon a division of said real estate, the plaintiff taking the north half and said defendant the south half thereof, and plaintiff conveyed his interest in the south half to said defendant, and said defendant conveyed his interest in the north half thereof to plaintiff, and each took possession of the part so conveyed to him.

That on the — day of —, 18—, said defendant sold and conveyed the said south half of said real estate to the defendant, —, subject to said mortgage, who still owns the same.

That plaintiff fully paid his one-half of said purchase-money as the same fell due, but neither the defendant, —, nor defendant, —, paid any part thereof.

That on the — day of —, 18—, said notes all being due, the defendant, —, brought his action in the — Circuit Court against plaintiff and the defendants, — and —, to recover the balance of said purchase-money and to foreclose said mortgage on the whole of said real estate, and plaintiff, to avoid the sale of his half of said property, was compelled to and did pay said notes, amounting to — dollars, all of which was justly due and owing by said defendant, —.

That said sum and the accumulated interest thereon, amounting in all to — dollars, is now due to plaintiff and unpaid.

Wherefore, the plaintiff demands judgment against the defendant, —, for said sum of — dollars, and asks that he be subrogated to the rights of said — under said mortgage; that the same be foreclosed and so much of said real estate now owned by the defendant as may be necessary be sold, and the proceeds applied to the payment of plaintiff's claim and costs, and for all other proper relief.

[*Copy of notes and mortgage.*]

[*Signature.*]

See PRINCIPAL AND SURETY, p. 266.

1. Grounds of right to subrogation. The right of subrogation, independent of contract, arises "where a man pays a debt which could not properly be called his own, but which, nevertheless, it was his interest to pay, or which he might have been compelled to pay for another, in which case the law subrogates him in all the rights of the creditor." *Spray v. Rodman*, 43 Ind. 225; *Richmond v. Marston*, 15 Ind. 134; *Peet v. Beers*, 4 Ind. 46; *Dunning v. Seward*, 90 Ind. 63; *Lowry v. Smith*, 97 Ind. 466; *Ritter v. Cost*, 99 Ind. 80; *The Farmer's Bank, etc., v. Butterfield*, 100 Ind. 229; *Carithers v. Stuart*, 87 Ind. 424; *Rooker v. Benson*, 83 Ind. 250; *Gillette v. Hill*, 102 Ind. 531.

And the right can not be claimed by a mere volunteer. *Richmond v. Marston*, 15 Ind. 134.

A purchaser at a judicial sale is subrogated to the rights of the judgment creditor where the sale is set aside. *R. S.* 1881, § 1084; *Seller v. Lingerian*, 24 Ind. 264; *Dunning v. Seward*, 90 Ind. 63; *Short v. Sears*, 93 Ind. 505; *Muer v. Berkshire*, 52 Ind. 149; *Willson v. Brown*, 82 Ind. 471; *Watkins v. Winings*, 102 Ind. 330; *Bodkin v. Merit*, 102 Ind. 293.

And the right passes by deed to his grantee. *Ray v. Detchon*, 79 Ind. 56.

So where a judgment holder has redeemed from a sale under a prior judgment, and the judgment of the redemptioner is afterward reversed on appeal and on a retrial, he recovers a second judgment. *Carver v. Howard*, 92 Ind. 173.

And where a surety on an appeal bond is compelled to pay the judgment appealed from. *Peirce v. Higgins*, 101 Ind. 178.

So where payment is made by the replevin bail. *Downey v. Washburn*, 79 Ind. 242; *Peirce v. Armstrong*, 95 Ind. 191.

2. Right of surety to be subrogated to rights of creditor. *R. S.* 1881, § 676; *Jones v. Tichner*, 15 Ind. 308; *Josselyn v. Edwards*, 57 Ind. 212; *Gerber v. Sharp*, 72 Ind. 553; *Manford v. Firth*, 68 Ind. 83; *Lowry v. Smith*, 97 Ind. 466; *Downey v. Washburn*, 79 Ind. 242; *Rooker v. Benson*, 83 Ind. 250.

SECTION XCI.

TAXES.

407.—Injunction against tax.

[*Caption and commencement.*]

That plaintiff is the owner of the following described real estate in the County of — : [*describe it.*]

That said property, with the improvements thereon, is and was, for the years — and —, valued for taxation at — dollars; and taxes for said years were duly assessed thereon for state, county, township, and school purposes, and charged on the tax duplicate of the county for said years, and plaintiff paid the full amount of said taxes for said years, except the semi-annual tax for the present year, which is payable on or before the — day of —, and amounts to — dollars.

That the auditor of said county has, without authority of law, placed upon said duplicate and directed the defendant, as treasurer of said county, to collect from plaintiff, upon said property, the further sums of —, additional taxes for the year —, and — dollars for the year —, in excess of the taxes legally charged on said property.

That on the — day of —, 18—, plaintiff tendered to defendant, as such treasurer, — dollars, being the total amount lawfully due of the semi-annual tax aforesaid on said property; but defendant refused and still refuses to receive said sum without payment of the said amounts so illegally charged.

That plaintiff has at all times since been, and still is, ready and willing, and now offers, to pay said amount lawfully due, and brings the same into court for the use of defendant.

That defendant intends, and threatens to enforce, the collection of the amounts unlawfully demanded, as aforesaid, as well as the amount lawfully due, and to sell said property at tax sale, or otherwise to distrain plaintiff's property therefor, to the great and irreparable injury of plaintiff.

Wherefore, plaintiff prays that defendant be enjoined from demanding and collecting from him, on said property, a greater sum than — dollars, lawfully due, and from adding any penalty thereto, and from demanding and collecting said amounts claimed to be due as additional taxes for the years — and —, and for all other proper relief.

[*Signature.*]

1. Illegal taxes, collection of may be enjoined. Ante, vol. 2, § 1436, and cases cited.

408.—To set aside sale of lands for taxes.

[*Caption and commencement.*]

That at the times hereinafter mentioned plaintiff was the owner of the following real estate in the County of —, State of Indiana: [*describe it.*]

That for the year — said property was duly assessed for taxation, and there was due thereon for taxes the sum of — dollars.

That said taxes were unpaid, and became delinquent for said sum and — dollars penalty and interest; and the defendant, —, as treasurer of said county, sold the same for said taxes to the defendant, —, on the — day of —, 18—, for the sum of — dollars, and the defendant, —, as auditor of said county, executed to him a certificate of sale thereof.

That at the time said lands were assessed for taxation for said year, and ever since, plaintiff has had personal property in said county, consisting of — [*state what, in general terms*], of the value of —, which was subject to levy and sale to satisfy said taxes.

That no demand was ever made upon plaintiff for personal property to satisfy said taxes, nor was any effort made to satisfy the same out of said personal property. [*Or allege any other facts showing the sale to be invalid.*]

That on the — day of —, 18—, plaintiff tendered to the defendant, — [the purchaser], and to the defendant, —, treasurer of said county, for his use, — dollars, being the amount of said taxes, interest, penalty, and costs, but they each refused to accept the same.

The plaintiff now brings said sum of money into court for the use of said defendant, —, and offers to pay the same upon said sale being declared void and set aside.

Wherefore, plaintiff prays the court that said sale be declared void; that said certificate issued to the defendant, —, be canceled, and for all other proper relief.

[*Signature.*]

1. Necessary allegations. If the action is to declare the sale void, the complaint must allege payment or tender of the amount of the taxes, interest, and penalty, and such interest on the amount of the purchase-price as is allowed by law. *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 64 Ind. 360; *Lancaster v. Du Hadway*, 97 Ind. 565; *Peckham v. Millikin*, 99 Ind. 352; *Flinn v. Parsons*, 60 Ind. 573; *Duke v. Brown*, 65 Ind. 25; *Hashbrook v. Schooley*, 74 Ind. 51.

And the tender must be kept good by bringing the money into court, and

alleging an offer to pay the same upon the relief being granted. *Lancaster v. Du Hadway*, 97 Ind. 565.

If the *tax* is illegal and creates no lien, the facts showing it should be averred. In such case, no tender is necessary. *Peckham v. Millikan*, 99 Ind. 352.

2. To whom tender may be made. The tender may be made to the purchaser, or to the treasurer of the county for his use. *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 64 Ind. 360.

3. Rights of purchaser on setting aside sale. The theory upon which the land-owner is required to pay or tender the taxes is, that by the purchase, although invalid, the lien of the state therefor is transferred to the purchaser. R. S. 1881, §§ 6496, 6497; *Ward v. Montgomery*, 57 Ind. 276; *Flinn v. Parsons*, 60 Ind. 573; *Peckham v. Millikan*, 99 Ind. 352.

Therefore he is entitled, the sale being set aside, to have his lien enforced against the property, and, if necessary, have it sold for the payment of the amount of the taxes, penalty, and interest for which it was bid in, with such interest as may be allowed by the particular statute under which the sale was made or the proceedings to enforce the lien was authorized. R. S. 1881, §§ 6496, 6497; *Peckham v. Millikan*, 99 Ind. 352.

Under the present statute the treasurer of the county is required to indorse on the certificate of sale a written guaranty that the taxes are due and unpaid at the time of the sale; and if they have been paid, the purchaser is given an action on the guaranty, or on the bond of the treasurer, for double the amount paid by him, with lawful interest thereon. R. S. 1881, § 6465.

A remedy is also provided against cities making invalid sales for taxes. *McWhinney v. The City of Indianapolis*, 101 Ind. 150.

But this is where the lien does not pass by the sale. *McWhinney v. City of Indianapolis*, 98 Ind. 182.

As to the rate of interest allowed the purchaser under the present statute, see R. S. 1881, §§ 6496, 6497; Sup. R. S. 1881, §§ 6853-6855; *Bowen v. Striker*, 100 Ind. 45.

See COUNTERCLAIM, p. 406.

SECTION XCII.

TRESPASS.

409.—Malicious injury to property.

[*Caption and commencement.*]

That on the — day of —, 18—, at —, defendant, maliciously intending to injure plaintiff, cut, broke, mutilated, defaced [*or, state other injury, according to the facts*], a certain [*state what*], the property of the plaintiff, of the value of — dollars, and greatly injured [*wholly de-*

stroyed] the same, so that plaintiff was obliged to expend — dollars in repairing the same.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

410.—Trespass to real estate.

[Caption and commencement.]

That on the — day of —, 18— [and on divers other days between that day and the beginning of this action], defendant wrongfully, unlawfully, and without leave, entered [*describe the land*], of which the plaintiff was then the owner, and lawfully in possession, and [*state the injury, e. g.*] depastured the same with cattle, trod down the grass and crops of plaintiff, and cut down and carried away — trees, of the value of — dollars, and converted and disposed of the same to his own use, and otherwise injured said premises.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

411.—Entering dwelling-house.

[Caption and commencement.]

That on the — day of —, 18— [and at divers times since said day], defendant unlawfully [*if the entry was forcible, add: and with force broke and*] entered a certain dwelling, the property of plaintiff, situated [*describe where, briefly*], [and ejected plaintiff and his family from the possession and enjoyment thereof, and kept them out of possession for — weeks, during which time they were deprived of the use and enjoyment thereof], and for the space of — hours made a great noise and disturbance therein, and forced and broke open and destroyed [*state property injured or destroyed*], and broke, injured, and defaced the walls and doors of said dwelling, and took away and converted and disposed of to his use [*state what*], of the value of — dollars.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

412.—Moving fence.

And took down and removed a fence upon said land, and also then and there erected another fence, which was not on the true dividing line between said land and the adjoining land, nor upon the line of said old fence.

413.—Mesne profits.

And ejected and expelled plaintiff from the possession thereof for — months, and until the — day of —, 18—, and during said period, took and received to his own use all the issues and profits of said property, being of the value of — dollars.

Whereby plaintiff, during said period, lost said issues and profits, to his damage — dollars, for which he demands judgment.

For further forms of complaints for trespass, see **ANIMALS**, pp. 23–28; **ASSAULT AND BATTERY**, pp. 28–30; **CONVERSION**, pp. 132, 133; **FALSE IMPRISONMENT**, p. 152.

1. Necessary allegations. *Gronour v. Daniels*, 7 Blkf. 108; *Rucker v. McNeely*, 4 Blkf. 179; *Donohue v. Dyer*, 28 Ind. 521; *City of Indianapolis v. Gilmore*, 30 Ind. 414; *Humphrey v. Merritt*, 51 Ind. 197.

2. What sufficient description. *Shipler v. Isenhower*, 27 Ind. 36.

3. Title. The action is possessory, and the complaint need not show title in the plaintiff, if he is in possession, but the action may be maintained on a showing of title without possession. *Ante*, vol. 1, § 411; *Barber v. Barber*, 21 Ind. 468; *Broker v. Scobey*, 56 Ind. 588; *The Bristol Hydraulic Co. v. Bower*, 67 Ind. 236; *Carney v. Reed*, 11 Ind. 417; *Catterlin v. Douglass*, 17 Ind. 213; *Larue v. Russell*, 26 Ind. 386.

4. Measure of damages. *Gebhart v. Burkett*, 57 Ind. 378; *The Anderson, etc., Ry. Co. v. Kernodle*, 54 Ind. 314; *Steele v. Davis*, 75 Ind. 191.

SECTION XCIII.**TRUSTS.****414.—To declare a trust in lands and enforce a conveyance.**

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff employed the defendant as his agent to purchase for plaintiff the following real estate [*describe it*], [*or, such real estate as defendant might in his judgment deem advisable in —*], and furnished him for said purpose the sum of — dollars.

That defendant, as such agent, on the — day of —, 18—, pur-

chased said real estate [or, the following real estate in —], and paid therefor, of plaintiff's money, the sum of — dollars.

That defendant, without the knowledge or consent of plaintiff, took the deed of conveyance for said real estate in his own name.

That the defendant still has in his hands, of plaintiff's money, so intrusted to him, the sum of — dollars.

That on the — day of —, 18—, plaintiff demanded of defendant an accounting and payment of said money and a deed to plaintiff for said real estate, all of which was refused.

Wherefore, plaintiff asks that defendant be compelled to account with plaintiff, and that he have judgment against defendant for — dollars, and that defendant be required to convey said real estate to plaintiff, or upon his failure so to do that a commissioner be appointed to make said conveyance, and for all other proper relief.

[Signature.]

1. Purchase in name of one person with money of another creates trust. R. S. 1881, § 2976; *Clifford v. Farmer*, 79 Ind. 529; *Goldsberry v. Gentry*, 92 Ind. 193; *Radcliff v. Radford*, 96 Ind. 482.

And it is not necessary that the conveyance be taken without the consent of the person whose money is invested. The trust may be created by a parol agreement made before the purchase, if the consideration is paid by the person claiming to be the beneficiary at or before the time of the purchase. *Boyer v. Libey*, 88 Ind. 235.

But not by a parol agreement made *after* the purchase. R. S. 1881, § 2976; *Westerfield v. Kimmer*, 82 Ind. 365; *Boyer v. Libey*, 88 Ind. 235; *Radcliff v. Radford*, 96 Ind. 482; *Derry v. Derry*, 98 Ind. 319; *French v. Shepler*, 83 Ind. 266.

So a payment of a part of the purchase-money will create a trust to the extent of the amount paid. *Derry v. Derry*, 98 Ind. 319.

For further forms relating to trusts, see **ACCOUNTING**, p. 18; **AGENT**, p. 20; **BONDS**, p. 74 et seq.

SECTION XCIV.

WARRANTY.

415.—Implied warranty of title.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant sold and delivered to plaintiff the following [*state what*], for the sum of — dollars, then paid him by plaintiff.

That said — were, at the time of said sale, in the possession of defendant, and were sold to plaintiff as being defendant's property.

That one — was then the owner of said —, and defendant had no right to sell the same.

That on the — day of —, 18—, said — recovered possession of the same from plaintiff by replevin [*or*, plaintiff was compelled to and did, on the — day of —, 18—, deliver the same up to said —], and the same were wholly lost to plaintiff.

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

1. When implied warranty arises. (a.) *Of ownership.* To raise an implied warranty that the seller is the owner of the property he must be in possession at the time of the sale. *Norton v. Hooten*, 17 Ind. 365.

As to the doctrine of implied warranty of title generally, see *Humphreys v. Comline*, 8 Blkf. 516; *Marshall v. Duke*, 51 Ind. 62.

(b.) *That property is fit for particular use.* *Humphreys v. Comline*, 8 Blkf. 516; *Burns v. Fletcher*, 2 Ind. 372; *Davis v. Murphy*, 14 Ind. 158; *Brenton v. Davis*, 8 Blkf. 317; *Mann v. Everston*, 32 Ind. 355; *Page v. Ford*, 12 Ind. 46; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *McClamrock v. Flint*, 101 Ind. 278.

(c.) *Of quality generally.* *Bowman v. Clemmer*, 50 Ind. 10; *Hege v. Newsom*, 96 Ind. 426.

(d.) *Genuineness of written instrument.* *Bell v. Cafferty*, 21 Ind. 411.

416.—That article was fit for designated purpose.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant sold and delivered to plaintiff [*state what*], for the purpose of [*state what*], for the sum of — dollars, and as a part of the contract of sale [*if in writing, say*:

a copy of which is filed herewith, and made a part of this complaint] warranted the same to be fit and proper for such purpose.

That on the — day of —, 18—, plaintiff attempted to use said — for said purpose, and fairly tested the same by [*state how it was tested*], but it was not reasonably fit for said purpose, but was defective and would not do good work in this [*state the defects and in what respect it failed to comply with the warranty*].

That plaintiff, confiding in said warranty, on the — day of —, 18—, expended — dollars in attempting to use said — [*state any special damages*].

Whereby plaintiff was damaged in the sum of — dollars, for which he demands judgment.

[*Signature.*]

[*If contract in writing, attach copy.*]

1. What will amount to an express warranty. *Humphreys v. Comline*, 8 Blkf. 516; *Ricketts v. Hays*, 13 Ind. 181; *House v. Fort*, 4 Blkf. 298; *The Richmond Trading, etc., Co. v. Farquar*, 8 Blkf. 89; *McConnell v. Jones*, 19 Ind. 328; *Jones v. Quick*, 28 Ind. 125; *Rose v. Hurley*, 39 Ind. 77; *Myers v. Conway*, 62 Ind. 474; *McClamrock v. Flint*, 101 Ind. 278; *Street v. Chapman*, 29 Ind. 142.

2. What will amount to a breach. *Ricketts v. Hays*, 13 Ind. 181; *Bragg v. Bamberger*, 23 Ind. 198; *First Nat. Bk. of Kansas City v. Grindstaff*, 45 Ind. 158; *Bowman v. Clemmer*, 50 Ind. 10; *The McCormick, etc., Co. v. Hays*, 89 Ind. 582; *McCormick, etc., Co. v. Embree*, 94 Ind. 85; *McCormick, McCormick, etc., Co. v. Gray*, 100 Ind. 285.

3. Warranty, how waived. *Brag v. Bamberger*, 23 Ind. 198; *The McCormick, etc., Co. v. Hays*, 89 Ind. 582.

4. Measure of damages. *Overbay v. Lighty*, 27 Ind. 27; *Street v. Chapman*, 29 Ind. 142; *Booker v. Goldsborough*, 44 Ind. 490; *Hege v. Newsom*, 96 Ind. 426.

5. Necessary allegations. If the warranty is in writing, it should be so alleged and the contract set out and made part of the complaint. Otherwise, it will be presumed to have been by parol, and no evidence of a written warranty can be given. *Morgan v. The Incorporated Co. of Garr, Scott & Co.*, 64 Ind. 213.

And it is held that where the contract is in writing and contains no warranty none can be added by parol evidence. *Johnson v. McCabe*, 37 Ind. 535.

Where the article sold is warranted, as in case of machinery, it is not sufficient to allege in general terms that it did not do good work. The warranty must be specifically alleged and that the article was properly tested, within a reasonable time, and how, and that upon being so tested it failed to comply with the warranty, and in what respect, and if defects are claimed to exist they must be alleged specifically. And where any conditions are annexed to the warranty, *e. g.*, that the article shall be tested in a certain way or for a certain time, that notice of a failure to work as warranted shall be given by the purchaser, or the like, the facts showing a compliance with the conditions must be alleged.

Booher v. Goldsborough, 44 Ind. 490; The Lafayette Agri'l Works v. Phillips, 47 Ind. 259; Robinson Machine Works v. Chandler, 56 Ind. 575; The Johnston Harvester Co. v. Bartley, 81 Ind. 406; McClamrock v. Flint, 101 Ind. 278.

It is said in some of the cases that where the warranty is general it is proper to state the breach generally. Leeper v. Shawman, 12 Ind. 463; The Johnston Harvester Co. v. Bartley, 81 Ind. 406. But they are not to be relied upon with safety.

A return or offer to return the property is not necessary.

417.—On sale by sample.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant sold to plaintiff [*state what*], by producing to him a pretended sample thereof, and warranted said — to be equal in quality and description to said sample.

That said — was not equal in quality and description to said sample, in this [*state in what it differed*].

[*Aver damages and ask judgment as above.*]

1. Property sold must correspond with sample. Gatling v. Newell, 9 Ind. 572.

418.—Warranty that horse is sound, and gentle in harness.

[*Caption and commencement.*]

That on the — day of —, 18—, defendant sold and delivered to plaintiff a horse, for the price of — dollars, then paid by plaintiff, and, as a part of the terms and consideration of said contract of sale, then warranted to plaintiff that said horse was sound, gentle, and quiet in harness.

That said horse was not, at the time of said sale, sound, gentle, and quiet in harness, but was unsound in this [*state in what the unsoundness consisted*], and was restive and ungovernable in harness, and was utterly worthless [*or, was worth — dollars less than he would have been had said warranty been true*].

[*Allege any special damages, e. g.*] That plaintiff has incurred — dollars necessary expenses in trying to cure said horse of said disease.

[*Or, said horse thereafter infected another horse of plaintiff's, of the value of — dollars, by reason whereof said horse was rendered worthless.*]

[*Or, on the — day of —, 18—, before plaintiff discovered said unsoundness, he sold said horse to one — for — dollars, and warranted the same to be sound; and by reason of said unsoundness plaintiff was compelled to pay said —, for breach of said warranty, — dollars damages and — dollars costs, in an action brought by*

said — against plaintiff thereon; and plaintiff incurred — dollars expenses in defending said action.]

[Or, plaintiff, relying on said warranty, on the — day of —, 18—, attempted to use said horse in harness; and, by reason of said horse being restive and ungovernable in harness, he, without plaintiff's fault, ran away, greatly injuring and breaking plaintiff's carriage, and injuring and bruising plaintiff.]

Whereby, plaintiff became sick, sore, and lame, and was unable to attend to his business, and was compelled to pay out, for medical attendance and nursing, — dollars, and was compelled to pay, for repairs on said carriage, — dollars.]

To plaintiff's damage — dollars, for which he demands judgment. [Signature.]

1. What will amount to a warranty of soundness. Myers v. Conway, 62 Ind. 474; Hull v. Kirkpatrick, 4 Ind. 637; Stanley v. Norris, 4 Blkf. 353; Jones v. Quick, 28 Ind. 125.

2. Necessary allegations. Ferguson v. Hosier, 58 Ind. 438; see Form 421, and notes.

3. Measure of damages. Ferguson v. Hosier, 58 Ind. 438.

SECTION XCV.

WASTE.

419.—By landlord against tenant..

[Caption and commencement.]

That the defendant held a certain dwelling-house and land, situate in the County of —, State of Indiana, as tenant of the plaintiff, under a lease for — years from the — day of —, 18— [from year to year for so long a time as the plaintiff and defendant should respectively please].

That on the — day of —, 18—, and at divers times between said day and the beginning of this action, the defendant, while such tenant, wrongfully, and without leave, cut down — apple trees, — pear trees, and — other trees of the plaintiff, of the value of — dollars, then growing upon the said land, and took and carried away the same and converted and disposed of them to his own use.

Whereby, the plaintiff is injured, in his reversionary estate and interest in the said dwelling-house and lands, in the sum of — dollars, for which he demands judgment. [Signature.]

420.—Devisee of remainder in fee against life tenant.

[*Caption and commencement.*]

That on the — day of —, 18—, one — was seized in fee-simple of the following real estate in the County of —, State of Indiana: [*describe it.*]

That on said day said — died in said county, leaving a last will, whereby he devised said premises to defendant for life; remainder, to plaintiff in fee-simple.

That said will was, on the — day of —, 18—, duly admitted to probate in said county, and defendant entered into possession of said premises thereunder.

[*State the facts showing the waste committed, and close as in Form 419.*] [Signature.]

1. What acts constitute waste. Dawson v. Coffman, 28 Ind. 220; Wheeler v. Me-shing-go-me-sia, 30 Ind. 402; Modlin v. Kenedy, 53 Ind. 267; Stout v. Dunning, 72 Ind. 343; Robertson v. Meadors, 73 Ind. 43; Miller v. Shields, 55 Ind. 71.

2. Necessary allegations. Stout v. Dunning, 72 Ind. 343.

3. When will forfeit lease. Bollenbacker v. Fritts, 98 Ind. 50.

SECTION XCVI.

WILLS.

421.—To contest.

[*Caption and commencement.*]

That on the — day of —, 18—, one —, the father of plaintiffs, died in this county, leaving plaintiffs and the defendants, — and —, his only children and heirs at law.

That on the — day of —, 18—, a certain paper writing, purporting to be the last will and testament of said —, bearing date of the — day of —, 18—, was presented to, and admitted to, probate by the Clerk of the — Circuit Court in said county on the — day of —, 18—, and filed and recorded in the record of wills of said county; and letters were thereupon issued to the defendant, —, as executor of said pretended will [*or, letters of administration were thereupon issued to the defendant, —*], who thereupon qualified.

That by the terms of said will the defendants, — and —, are

named as devisees and legatees in said will, and are given thereby the whole of the property of said —, real and personal, of the value of — dollars, to the entire exclusion of the plaintiffs, who are entitled, as heirs of said —, to an undivided one — each thereof.

That said pretended will is invalid, for the following reasons:

1. The said —, at the time said pretended will was attempted to be executed, was of unsound mind.

2. Said pretended will was unduly executed.

Wherefore, the plaintiff prays the court that said pretended will be declared invalid, and that the probate thereof be set aside.

[*Verification.*]

[*Signature.*]

1. Necessary allegations. Ante, vol. 2, § 1527, and cases cited.

422.—Objection to probate.

[*Caption and commencement.*]

That on the — day of —, 18—, one —, father of plaintiffs, died, in this county, the owner of real estate and personal property therein of the value of — dollars, and leaving the plaintiffs [and defendants], his children and only heirs at law.

That the plaintiffs [and defendants] are each entitled, as the heirs of —, to — [*state their interests in said property as heirs*].

That a pretended last will and testament of said —, of date —, has been presented to the clerk of this court for probate.

That by the terms of said pretended will the defendants are made the devisees and legatees thereof, and are given the whole of the property of said —, to the entire exclusion of these plaintiffs. [*Or, state the terms of the will generally, according to the facts.*]

The plaintiffs object to the probate of said will on the following grounds:

1. Said — was, at the time of the attempted execution of said pretended will, of unsound mind.

2. Said pretended will was unduly executed.

Plaintiffs further allege that these objections are not made for vexation or delay. Wherefore, they ask that the probate of said pretended will be denied.

[*Verification.*]

[*Signature.*]

1. Necessary allegations. R. S. 1881, § 2595; ante, vol. 2, § 1519.

As to the practice, generally, in the contest of wills, and objections to their probate, see ante, vol. 2, §§ 1512-1536.

APPEARANCE--SUMMONS--PUBLICATION.

NOTE.—As the next step in the course of an action, after the filing of the complaint, is to get the defendant into court, or take judgment if he fails to appear, forms relating to appearance, the summons, and publication are taken up before giving forms of subsequent pleadings.

SECTION XCVII.

APPEARANCE.

423.—Several forms.

(a.) By waiver filed in court and entered of record.

State of Indiana, ——— County.

In the ——— Circuit Court, ——— Term, 18—.

A. B. }
 v. } Waiver of Summons.
 C. D. }

I, A. B., the above named defendant, hereby enter my appearance in the above entitled cause, and waive the issuance and service of summons therein.

[Signature.]

Record entry of above.

[Title of cause.]

Now comes A. B., the above named defendant, and files in open court his appearance and waiver of the issuing and service of summons herein as follows: [here insert.]

1. Must be filed in court. The mere waiver of summons *out of court*, although in writing and indorsed on the complaint, is not sufficient. It must be by some formal entry *in open court*. Ante, vol. 1, §§ 224, 225; *Slaughter v. Hollowell*, 90 Ind. 286.

(b.) Entry of appearance and filing pleading.

[*Title of cause.*]

Comes the defendant and enters his appearance to this action without the issuing or service of summons, and files his demurrer to the complaint [answer], [motion to strike out parts of the complaint], as follows: [*here insert.*]

1. What will constitute an appearance. Ante, vol. 1, §§ 224-236; *Slaughter v. Hollowell*, 90 Ind. 286.

2. Effect of appearance. Ante, vol. 1, § 222.

424.—Special appearance—Motion to set aside summons or service.

[*Caption.*]

The defendant hereby enters a special appearance herein, for the purpose of moving the court to set aside the [service of the] summons, and moves the court to set aside [the service of] said summons on the following grounds: [*state the grounds of the motion.*]

[*Signature.*]

1. Special appearance, how entered and effect of. Ante, vol. 1, § 223.

SECTION XCVIII.

SUMMONS.

425.—Form of ordinary summons.

State of Indiana, — County, ss.

The State of Indiana to the Sheriff of — County, greeting:

You are hereby commanded to summon — to appear in the Circuit Court of — county, before the judge thereof, on the — day of —, 18—, the — day of the — term of —, held in the court-house in —, on the — Monday of —, 18—, to answer

the complaint [cross complaint], [supplementary complaint] of —, —, and of this writ make due return.

Witness the clerk of said court and the seal thereof, hereunto affixed, at —, this — day of —, 18—.

[L. S.]

—, Clerk.

426.—Summons to garnishee.

State of Indiana, — County, ss.

The State of Indiana to the Sheriff of — County, greeting:

You are hereby commanded to summon —, if — may be found in your bailiwick, to appear before the judge of the Circuit Court of — county on the — day of the next term of said court, to be held at the court-house, in —, on the — Monday in —, 18—, then and there to answer as garnishee in a cause now pending in said court, wherein — is plaintiff and — defendant, and herein — may not fail at — peril. And have you then and there this writ.

Witness the clerk of said court and the seal thereof, hereunto affixed, at —, this — day of —, 18—.

[L. S.]

—, Clerk.

1. **What summons should contain.** R. S. 1881, §§ 814, 317. *Ante*, vol. 1, § 207.

2. **When must issue on cross or supplemental complaint.** *Ante*, vol. 1, §§ 208, 209.

427.—Indorsement on complaint, for return during term.

[*Caption.*]

The plaintiff hereby fixes the — day of —, 18—, the — day of the — term, 18—, of the — Circuit Court, as the day on which the defendant shall appear, and the clerk of said court is directed to issue summons returnable on said day.

—, Attorney for Plaintiff.

1. **What indorsement must contain.** R. S. 1881, § 516; *ante*, vol. 1, § 205; *Johnson v. Lynch*, 87 Ind. 326.

2. **When summons returnable.** R. S. 1881, §§ 314, 516; *ante*, vol. 1, §§ 205, 206.

428.—Proof of service—By sheriff's return—Several forms.

(a.) **Personal service.**

Served the within summons on the — day of —, 18—, by reading the same to and within the hearing of the defendant, —, and of

—, guardian of the defendant, —, and by leaving a copy thereof at the last and usual place of residence of the defendant, —.

—, Sheriff.

(b.) On corporations.

Served the within summons on the defendant, the First National Bank of Vevay, Indiana, on the — day of —, 18—, by reading the same to and within the hearing of —, president of said bank, and on the defendant, the City of Vevay, by reading the same to and within the hearing of —, mayor of said city [or, of —, the marshal of said city, —, the mayor thereof, not found in the county.

—, Sheriff.

1. What sufficient return. Ante, vol. 1, §§ 243, 247.

429.—By admission of defendant on back of summons.

I, —, defendant in the within named cause, hereby acknowledge the personal service of the within summons on me by reading, this — day of —, 18—. [Signature.]

430.—By affidavit—Service out of state.

State of Indiana, County of —, ss.

—, being duly sworn, says: I served the summons attached hereto [the within summons] on the defendant, —, at —, by reading the same to and within his hearing on the — day of —, 18—.

That said defendant is a non-resident of the State of Indiana, and the said —, on whom said service was made, is the identical person named as — in plaintiff's complaint in this action. [Signature.]

[Jurat.]

1. Service out of state, how proved. R. S. 1881, § 319; ante, vol. 1, § 241.

2. Is not personal service. R. S. 1881, § 319; ante, vol. 1, § 211.

SECTION LCIX.

PUBLICATION.

431.—Affidavit for publication.

[Caption.]

—, being duly sworn, on his oath says he is the plaintiff in the above cause, and that the defendant is a foreign corporation, and has property within this state.

Or, That the defendant is a foreign corporation, and the cause of action alleged in the complaint arose in this state.

Or, That the defendant is a resident of this state, but has departed therefrom, with intent to defraud his creditors.

Or, That the defendant is a resident of this state, but has departed therefrom, with intent to avoid the service of summons in this action.

Or, That the defendant is a resident of this state, but keeps himself concealed therein, with intent to defraud his creditors.

Or, That the defendant is a resident of this state, but keeps himself concealed therein, with intent to avoid the service of summons in this action.

Or, That the defendant is not a resident of this state, and the cause of action alleged in the complaint in this action is founded upon a contract in relation to real estate in this state.

Or, That the defendant is not a resident of this state, and the cause of action alleged in the complaint in this action is connected with a contract in relation to real estate in this state.

Or, That the defendant is not a resident of this state, and the cause of action alleged in the complaint in this action arises from a duty imposed by law in relation to real estate in this state.

Or, That the defendant is not a resident of this state, and the object of this action is to enforce [*or*, discharge] a lien upon real estate in this state.

Or, That the defendant is not a resident of this state, and the object of this action is to obtain a divorce.

Or, That the defendant is not a resident of this state, and this action is brought to try and determine [*or*, quiet] the title to [*or*, recover possession of] real estate [*or*, an interest in real estate] in this state.

Or, That the defendant is not a resident of this state, and this ac-

tion is brought to enforce the collection of plaintiff's demand by proceedings in garnishment [*or*, attachment].

Or, That the residence of the defendant [*or*, of the defendant, —] is unknown, and, upon diligent inquiry, can not be ascertained.

Or, That the name of the defendant sued in this action as John Doe is unknown, and he is believed to be a non-resident of this state.

[*Jurat.*]

[*Signature.*]

1. What affidavit must contain. R. S. 1881, § 318; ante, vol. 1, § 219, 220; *Brenner v. Quick*, 88 Ind. 546; *Field v. Malone*, 102 Ind. 13; *Hamilton v. Barricklow*, 96 Ind. 398; *Dowell v. Lahr*, 97 Ind. 146.

In the syllabus to the case last cited it is said that, under the provisions of section 318 R. S. 1881, the affidavit must state that a cause of action exists against the defendant, or that he is a necessary party to the action. This is a mistake. The affidavit was made under section 38 of the code of 1852, which expressly requires such a showing, and section 318 of the R. S. of 1881, which contains no such requirement, is not referred to in the opinion. There is a material difference between the two sections. Ante, vol. 1, §§ 219, 220; *Carrico v. Tarwater*, 103 Ind. 86.

432.—Form of notice.

The State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Notice.
C. D. }

The plaintiff in the above cause having filed his complaint therein, together with an affidavit that [*state the grounds of the affidavit for publication, e. g.*] the defendant, —, is a foreign corporation, and has property within this state:

Now, therefore, the [said] defendant is hereby notified that unless he [it] be and appear on the — day of the next Term of the — Circuit Court to be holden on the — Monday of —, A. D. 18—, at the court-house in —, in said county and state, and answer or demur to said complaint, the same will be heard and determined in — absence.

In witness whereof, I hereunto set my hand and affix the seal of said court this — day of —, A. D. 18—.

[L. S.]

—, Clerk.

1. How long must be published. Ante, vol. 1, § 221.

2. What notice must contain. R. S. 1881, § 318; *Morgan v. Woods*, 33 Ind. 23; *Waltz v. Borroway*, 25 Ind. 380; *Green v. Green*, 7 Ind. 113.

433.—Proof of publication.

State of Indiana, — County, ss.

Personally appeared before me Clerk of the — Circuit Court, —, who, being duly sworn on his oath, says he is the publisher of the —. That the same is a weekly newspaper, of general circulation, printed in the English language, and published at —, County of —, State of Indiana, and that the notice, a true copy of which is attached hereto, was duly published in said paper for three weeks successively, the first of which publications was on the — day of —, 18—, and the last on the — day of —, 18—. [Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk.

1. What affidavit must contain. R. S. 1881, § 318; *Bonnell v. Ray*, 71 Ind. 141.

2. How defendant may obtain relief where notice is insufficient. *Brown v. Goble*, 97 Ind. 86; *Carrico v. Tarwater*, 103 Ind. 86.

DEMURRER.

SECTION C.

434.—To complaint assigning all causes.

State of Indiana, ——— County.

In the ——— Circuit Court, ——— Term, 18—.

A. B. }
v. } Demurrer.
C. D. }

The defendant, ———, demurs to the plaintiff's complaint on the following grounds:

1. The court has no jurisdiction of the person of the defendant.
2. The court has no jurisdiction of the subject-matter of the action.
3. The plaintiff has not legal capacity to sue.
4. There is another action pending between the same parties for the same cause.
5. There is a defect of parties plaintiff in this: ——— is a necessary party plaintiff and should be joined.
6. There is a defect of parties defendant in this: ——— is a necessary party defendant and should be joined.
7. The complaint does not state facts sufficient to constitute a cause of action.
8. Several causes of action are improperly joined in the complaint in this: [*state the causes.*] [Signature.]

1. When grounds of demurrer should be numbered. *Stribling v. Brougher*, 79 Ind. 328; *Petty v. The Board of Trustees*, etc., 70 Ind. 290.

435.—Joint and several demurrer.

[Caption.]

The defendants demur to the plaintiffs' complaint, and to each of the paragraphs separately, on the following grounds:

1. The court has no jurisdiction of the subject-matter of the action.

2. The complaint does not state facts sufficient to constitute a cause of action.

3. The first paragraph of the complaint does not state facts sufficient to constitute a cause of action.

4. The second paragraph of the complaint does not state facts sufficient to constitute a cause of action. [Signature.]

436.—Several demurrer.

[Caption.]

The defendant demurs, separately and severally, to each paragraph of plaintiffs' complaint, and, for cause of demurrer, says that neither of said paragraphs contains facts sufficient to constitute a cause of action. [Signature.]

1. Form of joint and several demurrers. Ante, vol. 1, § 528; *Silvers v. The Junction R. R. Co.*, 43 Ind. 435; *Carver v. Carver*, 97 Ind. 497; *Stribling v. Brougher*, 79 Ind. 328.

437.—Separate and several demurrer.

[Caption.]

The defendant, —, demurs, severally, to each paragraph of the complaint, on the ground that neither of said paragraphs states facts sufficient to constitute a cause of action against him. [Signature.]

1. Forms of demurrers generally. See ante, vol. 1, §§ 471, 528-531.

2. Failure to demur, effect of. Ante, vol. 1, §§ 519-521, 532-536.

3. Forms of demurrer, separate as to parties. Ante, vol. 1, § 529; *Carver v. Carver*, 97 Ind. 498.

438.—To several breaches in same paragraph.

[Caption.]

The defendants demur, severally, to the —, —, and — breaches of the — paragraph of plaintiffs' complaint, on the ground that neither of said breaches states facts sufficient to constitute a cause of action. [Signature.]

1. When demurrer will lie to parts of paragraph. Ante, vol. 1, § 511; *Mustard v. Hoppes*, 69 Ind. 324; *Hilton v. Mason*, 92 Ind. 157.

439.—Demurrer to answer.

[Caption.]

The plaintiff demurs, severally, to each paragraph [or, to the — and — paragraphs] of the defendant's answer, on the ground that

neither of said paragraphs states facts sufficient to constitute a cause of defense to plaintiff's complaint. [Signature.]

1. Causes for demurrer to answer. R. S. 1881, § 346.

2. What demurrer must contain. Ante, vol. 1, § 471; *Thomas v. Goodwine*, 88 Ind. 458; *Young v. Warder*, 94 Ind. 357.

440.—Demurrer to reply.

[Caption.]

The defendant demurs, severally, to the — and — paragraphs of the plaintiff's reply to the — paragraph of defendant's answer, upon the ground that neither of said paragraphs states facts sufficient to avoid said paragraph of answer. [Signature.]

1. Causes for demurrer to reply. Formerly, the code provided that the defendant might demur to a reply "*for any of the causes specified for demurring to the complaint.*" Code of 1852, § 67; *McAroy v. Wright*, 25 Ind. 22.

The present code provides: "The defendant may demur to any paragraph of the reply, on the ground that *the facts stated therein are not sufficient to avoid the answer*; or, if the answer be a set-off or counter-claim, any part thereof." R. S. 1881, § 357; ante, vol. 1, §§ 685, 686; *Miller v. White River School Tp.*, 101 Ind. 503.

441.—Demurrer to evidence.

[Caption.]

Upon the trial of this cause the plaintiff, to support the issues on his behalf, introduced the following evidence: [*set out the plaintiff's evidence in full.*]

And this being all the evidence given in the cause [on behalf of the plaintiff], the defendant says that it is not sufficient for the plaintiff to have and maintain this action, and therefore he demurs thereto; and the defendant admits the written evidence, and all the facts stated by the witnesses hereinbefore set out, and every inference and conclusion that may rightfully and reasonably be drawn therefrom.

[Signature.]

1. What demurrer should contain. Ante, vol. 1, § 548.

The form given contains an express admission of the evidence, and all conclusions and inferences to be drawn therefrom. This is the form usually adopted. *Busk, Prac.* 201; *Iglehart's Prac.* 637.

But whether the demurrer contains the express admission or not, the law will imply it. Ante, vol. 1, § 549; *Willcutts v. The Northwestern, etc., Ins. Co.*, 81 Ind. 300; *The Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435; *Radcliff v. Radford*, 96 Ind. 482; *Nordyke, etc., Co. v. Van Sant*, 99 Ind. 188; *Kincaid v. Nicely*, 90 Ind. 403; *Bethell v. Bethell*, 92 Ind. 318; *Wright v. Julian*, 97 Ind. 109; *McLean v. The Equitable, etc., Society*, 100 Ind. 127; *Stockwell v. The State*, 101 Ind. 1.

2. What evidence considered in ruling on demurrer. The evidence favorable to the party demurring can not be considered in passing upon his demurrer. The right to have the demurrer sustained rests upon *the want of evidence on the part of his opponent*. Fritz v. Clark, 80 Ind. 591; Wright v. Julian, 97 Ind. 109; Ruff v. Ruff, 85 Ind. 431; Ruddell v. Tyner, 87 Ind. 529; Vigo Agri. Society v. Brumfield, 102 Ind. 146.

It follows that a demurrer by the party having the burden of the issue can never be successful. Fritz v. Clark, 80 Ind. 591; Reynolds v. Baldwin, 93 Ind. 57; Lake Shore, etc., Ry. Co. v. Foster, 104 Ind. 293.

A contrary rule was recognized, but not directly decided, in earlier cases. Strough v. Gear, 48 Ind. 100; Thomas v. Ruddell, 66 Ind. 326; Baker v. Baker, 69 Ind. 399. But these cases are overruled by the later decisions.

3. No joinder necessary. A joinder in demurrer is not necessary, and the better practice is not to join, as such joinder is held to admit that the evidence is properly set out in the demurrer. Ante, vol. 1, §§ 551, 552; Radcliff v. Radford, 96 Ind. 482; Reynolds v. Baldwin, 93 Ind. 57.

4. When demurrer will be sustained. Ante, vol. 1, § 549; Wright v. Julian, 97 Ind. 109; Lyons v. Terre Haute, etc., R. R. Co., 101 Ind. 419; McLean v. The Equitable, etc., Society, 100 Ind. 127; Ruff v. Ruff, 85 Ind. 431.

5. How evidence must be set out. Baker v. Baker, 69 Ind. 399.

6. What demurrer waives. Ante, vol. 1, § 550; McLean v. Equitable, etc., Society, 100 Ind. 127.

442.—Objection to demurrer.

[Caption.]

The plaintiff [defendant] objects to the defendants' [plaintiffs'] demurrer to the evidence herein and moves to reject the same, on the following grounds: [*state the grounds, e. g.*]

1. On the ground that the defendant [plaintiff] has the burden of the issue herein, and a demurrer to the evidence can not, for that reason, be interposed by him.

2. Said demurrer does not contain all of the evidence given in the cause, in this: [*state the omitted evidence.*]

[*State any other objections.*]

[Signature.]

443.—Motion to correct.

[Caption.]

The plaintiff [defendant] shows to the court that the defendant's [plaintiff's] demurrer to the evidence herein is defective, in this: [*state the defect, e. g.*] The same does not contain the following evidence given on the part of the plaintiff [defendant], to wit: [*set out the omitted evidence.*]

Wherefore, he moves the court to require the defendant [plaintiff] to amend and correct said demurrer by inserting said evidence therein in the proper place.

[Or, The defendant (plaintiff) has inserted in and made a part of said demurrer the evidence given on his own behalf.

Wherefore, plaintiff (defendant) moves the court to strike out said evidence, commencing at line —, page — of said demurrer, and extending to and including the word —, line —, page — thereof.] [Signature.]

1. **Motion to correct.** Ante, vol. 1, § 552; Reynolds v. Baldwin, 93 Ind. 57.

A motion to correct by striking out the evidence of the party demurring would seem to be unnecessary, as it has been held that the demurrer may be overruled on the ground that it contains such evidence. Ruddell v. Tyner, 87 Ind. 529.

For further Forms, see JUDGMENTS, p. 445.

ANSWER.

SECTION CI.

DISCLAIMER—INTERPLEADER.

444.—General form.

[*Caption.*]

The defendant, by way of disclaimer, alleges :

1. That he disclaims any estate or interest in the real estate described in plaintiff's complaint, and that he is not in possession thereof.

[*Signature.*]

445.—Disclaimer of part and denial of part.

[*Caption.*]

The defendant, by way of disclaimer and for answer, alleges .

That he is not in possession of the following real estate, described in plaintiff's complaint, to wit [*describe it*], and that he disclaims any estate or interest therein.

And as to the other real estate described in the complaint he denies each and every allegation of the complaint relating thereto.

Wherefore, he demands judgment for costs.

[*Signature.*]

1. Practice in case of disclaimer. Ante, vol. 1, §§ 555-557.

INTERPLEADER.

446.—In action for money.

[*Caption.*]

The defendant, by way of interpleader, alleges :

That he admits that he is indebted in the sum alleged in plaintiff's complaint, but that one ——— claims to be entitled to payment thereof to him, and threatens to and will sue defendant therefor [and has notified defendant not to pay the same to plaintiff].

That ——— makes said claim without collusion with defendant.

That defendant is ignorant of the rights of said parties, and has no interest in the controversy.

That defendant now brings said sum of money into court for the use of the party who may be found to be entitled thereto.

Wherefore, he asks that he be allowed to pay said sum into court; that the said — be substituted as a party herein in this defendant's stead, and that defendant be discharged from further liability.

[Verification.]

[Signature.]

447.—In action for personal or real property.

[Caption.]

The defendant, by way of interpleader herein, alleges:

That he admits a cause of action against him for the property described in plaintiff's complaint, but alleges that one —, without any collusion with this defendant, also claims to be the owner and entitled to the possession of said property [and has notified defendant not to deliver the same to the plaintiff, or he will hold defendant responsible therefor], and threatens to, and will, sue this defendant to recover the same.

That defendant is ignorant of the rights of said parties, and has no interest in the controversy.

That defendant is ready and willing to deliver said property to the person entitled thereto, and now brings the same into court for his use [*or, if the property can not be brought into court, say: and is ready and willing to deliver the same to such person as this court may designate, for the use of the person entitled thereto*].

Wherefore, the defendant asks that said — be substituted in his stead as defendant; that defendant be allowed to deliver up said property, and that he be thereupon discharged from all further liability.

[Verification.]

[Signature.]

1. What must be shown to authorize interpleader. R. S. 1881, § 273; ante, vol. 1, §§ 171-175; *Nofsinger v. Reynolds*, 52 Ind. 218; *Ketcham v. The Brazil, etc., Co.*, 88 Ind. 515.

See COMPLAINT for INTERPLEADER, p. 181; NOTICE, p. 596.

SECTION CII.

IN ABATEMENT.

448.—Want of capacity to sue.

[*Caption.*]

The defendant, by way of plea in abatement herein, alleges:

That the plaintiff is an infant, under the age of twenty-one years, and has not sued in this cause by guardian or next friend.

Or, That the plaintiff sues in this action as the executor of the last will and testament of —, and that the plaintiff is not, and never was, the executor of said last will and testament.

Or, The plaintiff sues in this action as the —, a corporation, but the plaintiff alleges that the charter of said pretended corporation was, on the — day of —, 18—, forfeited by the consideration and judgment of the — Court, in an action therein by — against —, and that by force of said judgment said corporation then ceased to exist, and the plaintiff is not now a corporation.

Or, That the plaintiff sues in this action as the —, a corporation, but the plaintiff is not now, and never was, a corporation.

Wherefore, the defendant prays that this action may abate.

[*Verification.*]

[*Signature.*]

1. Causes for abatement on ground of want of capacity to sue.
Ante, vol. 1, § 564.

449.—Non-joinder of necessary party.

[*Caption.*]

The defendant, by way of answer in abatement, alleges:

That the contract sued on by plaintiff was made by defendant with plaintiff and one —, jointly, and the said —, who is still living, is equally interested with plaintiff in said contract, is a necessary party plaintiff in this action, and is not joined.

Wherefore, the defendant prays that this action may abate.

[*Verification.*]

[*Signature.*]

1. Necessary allegations. Ante, vol. 1, §§ 565, 566. It is held that an answer that the plaintiff is not the real party in interest is in bar and not in abatement. *Pixley v. Van Nostern*, 100 Ind. 34.

2. Non-joinder of defendant—Necessary allegations. Ante, vol. 1, § 566.

450.—Another action pending.

[Caption.]

The defendant, by way of answer in abatement, alleges:

That on the — day of —, 18—, plaintiff brought his action in the — Court against this defendant, alleging the same cause of action set out in the complaint herein.

That the parties to said action are the same as in this action.

That said cause is still pending in said court.

Wherefore, the defendant prays that this action may abate.

[Verification.]

[Signature.]

1. Necessary allegations. Ante, vol. 1, §§ 567, 568.

451.—Misnomer.

[Caption.]

—, against whom the plaintiff has brought this action in the name of —, for answer in abatement, alleges that his true name is —, and that he was never known or called by the said name of —.

Wherefore he prays that this action may abate. [Signature.]

[Verification.]

1. Practice in case of misnomer. Ante, vol. 1, §§ 505, 569; *McCrary v. Anderson*, 103 Ind. 12.

452.—Action prematurely brought—Failure of foreign corporation to comply with statute.

[Caption.]

The defendant, by way of answer in abatement, alleges:

That the plaintiff is a foreign Insurance Company, organized as a corporation under the laws of — and doing business as such in this state.

That the pretended contract sued on herein was entered into, and to be performed, at —, in this state, and was entered into on behalf of plaintiff by and through one —, claiming to be, and acting as, the agent of plaintiff for the county of —, in this state.

That said — had not, at the time of entering into said contract, nor has he at any time since, deposited in the clerk's office of said county any power of attorney, commission, appointment, or other authority under or by which he acted as such agent.

Wherefore, the defendant prays that this action may abate.

[Verification.]

[Signature.]

1. Is the failure of a corporation to comply with the statute, matter in abatement? It is held, in a number of well-considered cases, that

the failure of a foreign corporation to comply with the requirements of a statute, imposing conditions upon which it shall transact business in this state, can not be pleaded in bar of an action brought by the corporation, but is matter in abatement. *Ante*, vol. 1, § 570, and cases cited; *Finch v. The Travelers' Ins. Co.*, 87 Ind. 302; *Elston v. Piggott*, 94 Ind. 14; *Behler v. The German, etc., Ins. Co.*, 68 Ind. 347; *Smith v. Little*, 67 Ind. 549; *The American Ins. Co. v. Wellman*, 69 Ind. 413; *The Singer Mfg. Co. v. Effinger*, 79 Ind. 264; *Morgan v. White*, 101 Ind. 413.

These cases would seem to settle the question beyond all controversy. But the line of decisions is not unbroken. It was held, in a late case, that an answer setting up a failure to comply with the act of December 21, 1865 (R. S. 1881, § 3765) "*constituted a complete bar to any recovery by the appellee on the note in suit.*" *Cassady v. The American Ins. Co.*, 72 Ind. 95.

The action was to recover on a promissory note given as a consideration for a policy of insurance. The answer is held to be good on the ground that the policy was the sole consideration for the note; that the policy was "*illegal and void,*" and "*the consideration of the note being illegal and void, its payment could not be enforced by law.*" The other cases cited have been decided, some before and some since the one quoted from, but none of them refer to it, either to approve or disapprove the doctrine laid down. And the opinion in the case of *Cassady v. The American Ins. Co.* contains no reference to the many other cases, which seem to be clearly and positively the other way, but cites, in support of the doctrine laid down, *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Hoffman v. Banks*, 41 Ind. 1; *The Union Central Life Ins. Co. v. Thomas*, 46 Ind. 44; *Williams v. Cheney*, 8 Gray, 206; *Buxton v. Hamblen*, 32 Maine, 448; *Boutwell v. Foster*, 24 Vt. 485; *Brackett v. Hoyt*, 9 Fost., N. H. 264; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394. And the case of *The Farmers', etc., Ins. Co. v. Harrah*, 47 Ind. 236, might have been cited to the same effect. See also the subsequent case of *The American Ins. Co. v. Pressell*, 78 Ind. 442.

In the case of *The Walter A. Wood Mowing, etc., Co. v. Caldwell*, 54 Ind. 270, the first to depart from the rule that such contracts were void, a distinction is attempted to be made between the act relating to corporations generally (R. S. 1881, §§ 3022-3030) and the act relating to insurance companies (R. S. 1881, §§ 3765, 3771), on the theory that in the latter "there are positive declarations of illegality of acts, positive prohibitions to the corporation, and penalties upon any person or persons violating the provisions of this act, not simply upon agents neglecting to comply with its provisions," and the former, so far as it provided for a *penalty* for a failure to comply with its terms, applied to the *agents* of the corporation only. *The Walter A. Wood Mowing, etc., Co. v. Caldwell*, 54 Ind. 270.

But this distinction has neither been maintained nor observed in later cases. *American Ins. Co. v. Wellman*, 69 Ind. 413; *Finch v. The Travelers' Ins. Co.*, 87 Ind. 302; *Behler v. The German, etc., Ins. Co.*, 68 Ind. 347.

It seems to be clearly established by the decided cases that a failure to comply with sections 3022 and 3023 R. S. 1881 can only be pleaded in abatement. But as to section 3765, the question must be regarded as an open one.

2. Necessary allegations. See *ante*, vol. 1, § 576, and authorities cited in the above note.

See FORM 487, *post*, p. 357; PATENT RIGHTS, p. 389 note 6.

ANSWERS IN BAR.

SECTION CIII.

DENIALS.

453.—General denial.

[Caption.]

The defendant, for answer to plaintiff's complaint, denies each and every allegation thereof.

[Signature.]

1. **What general denial puts in issue.** Ante, vol. 1, §§ 578–585.

2. **What should contain.** Ante, vol. 1, § 578.

454.—Denial of cause for attachment.

[Caption.]

The defendant, for answer in the attachment proceeding herein, denies each and every allegation of the affidavit for attachment.

Wherefore, he demands judgment in the attachment proceeding.

[Signature.]

1. **Attachment proceeding may be answered separately.** Ante, vol. 1, § 1324.

455.—Denial of part and confession and avoidance of balance.

[Caption and commencement.]

That as to so much of said complaint as alleges [*state what*], he denies each and every allegation thereof, and as to the balance of said complaint, alleges: [*state facts in confession and avoidance*.]

Or, As to so much of said complaint as sets up [*state what*], he alleges: [*state matter in confession and avoidance*], and as to the balance of said complaint, he denies each and every allegation thereof.

[Signature.]

1. **May deny a part and avoid a part.** The necessity for this manner of pleading arises where a defendant can only meet a part of a paragraph of

the complaint by a denial and a part by a confession and avoidance; and in that case care must be taken to make the two branches of the defense, taken together, cover the whole cause of action. Ante, vol. 1, § 589.

456.—Denial of execution of written instrument—Non est factum.

[Caption.]

The defendant, for answer to plaintiff's complaint, alleges:

1. That he did not execute the note [or name the instrument] sued on in this action.

Wherefore, he demands judgment.

[Signature.]

[Verification.]

1. Necessary allegations. It is held that the general denial, sworn to, is sufficient, but it is not the better mode of pleading. The denial of the execution may, however, be in general terms. Ante, vol. 1, § 635; *Hine v. Shively*, 84 Ind. 136.

2. Must be verified. Ante, vol. 1, §§ 635, 636. And where the answer is joint it must be verified by all who join, or it is good only as to those who do verify. *Feeney v. Mazelin*, 87 Ind. 226. As to the effect of *non est factum* by one partner, see *Lucas v. Baldwin*, 97 Ind. 471; post, p. 388.

3. What may be proved under. Ante, vol. 1, § 635

As to other sworn denials, see ANSWERS IN ABATEMENT, p. 334.

SECTION CIV.

IN CONFESSION AND AVOIDANCE.

NOTE.—In giving forms of answers in confession and avoidance, they are, as far as is practicable, arranged in alphabetical order, as is done in giving forms of complaints, not only as to the subjects to which they are applicable, but as to the kind of answer pleaded.

As to some of the subjects considered under the complaint, as, for example, that of ejectment, no special answers are necessary. Such, of course, are here entirely omitted, and others are purposely omitted, because they are sufficiently covered by forms equally applicable to other subjects.

ACCORD AND SATISFACTION.

457.—General form.

State of Indiana, — County.
In the — Circuit Court, — Term, 18—.

A. B. }
v. }
C. D. } Answer.

The defendant, for answer to plaintiff's complaint, alleges:

1. That he denies each and every allegation thereof.

2. That on the — day of —, 18— [or, after plaintiff's cause of action accrued, and before this action was brought], defendant delivered to plaintiff, and plaintiff received, in full satisfaction and discharge of said cause of action in the complaint alleged the following: [*state what was given.*]

Wherefore, he demands judgment for costs. [Signature.]

1. Necessary allegations. Ante, vol. 1, § 598; *Eichholtz v. Taylor*, 88 Ind. 38; *Atchison v. Lee*, 75 Ind. 132; *Shade v. Creviston*, 93 Ind. 591.

458.—Payment in money, or with commercial paper, of less than is due.

[*Caption and commencement.*]

That on the — day of —, 18—, the amount sued for by plaintiff not then being due, and plaintiff desiring to raise money on said claim, agreed with defendant that if defendant would pay him the sum of — dollars he would accept the same in full satisfaction thereof, in consideration of which defendant then paid plaintiff said sum of — dollars.

[Or, That defendant had, prior to the — day of —, 18—, made different payments in various amounts on the note sued on, and a dispute arose between plaintiff and defendant as to the amount of said payments and the sum actually due on said note, in consideration of which, and to avoid expense and litigation, it was mutually agreed that defendant should execute and plaintiff receive, in full satisfaction of said note, the defendant's check on the — Bank, of —, Indiana, for the sum of — dollars, in full satisfaction of said note and in settlement of said dispute, which check defendant then and there executed to plaintiff, and plaintiff accepted in full satisfaction of said note.]

Wherefore, defendant demands judgment for costs.

[Signature.]

1. When payment of less than is due will amount to accord and satisfaction. Ante, vol. 1, §§ 597, 598; *Wells v. Morrison*, 91 Ind. 51; *Fletcher v. Wurgler*, 97 Ind. 223; *Longworth v. Higham*, 89 Ind. 352.

2. Payment with commercial paper. Ante, vol. 1, § 597; *Fensler v. Prather*, 43 Ind. 119; *Wells v. Morrison*, 91 Ind. 51.

3. Forged paper not a payment. *Allen v. Sharpe*, 37 Ind. 67.

ACCOUNT—ACCOUNT STATED.

459.—Settlement before suit.

[*Caption and commencement.*]

That on the — day of —, 18— [or, before the bringing of this action], plaintiff and defendant had a full and final settlement of all of their accounts, including the items of account sued on herein, and it was found that defendant was indebted to plaintiff in the sum of — dollars, for which sum defendant then executed to plaintiff his promissory note, with — per cent interest, payable — months after date, in full satisfaction of the amount so found to be due him.

Wherefore, defendant demands judgment for costs.

[*Signature.*]

1. Necessary allegations. *Collins v. Makepeace*, 13 Ind. 448; *Terry v. Shively*, 64 Ind. 106; *Bright v. Coffman*, 15 Ind. 371.

2. Effect of giving note in settlement. *Gaskin v. Wells*, 15 Ind. 253; *Phelps v. Younger*, 4 Ind. 450; *Frazer v. Boss*, 66 Ind. 1, 14; *Audleur v. Kuffel*, 71 Ind. 543; *Kirchner v. Lewis*, 27 Ind. 22.

460.—Fraud and mistake—Account stated.

[*Caption and commencement.*]

That defendant admits that he and plaintiff had an accounting on the — day of —, 18—, and that the sum of — dollars was thereby found to be due from defendant to plaintiff; but says that, at the time of said accounting certain errors and false charges, of which defendant was then wholly ignorant, were, by mistake and oversight, made in the account in the following particulars: he is entitled to the following credits, which were wholly omitted from said account: [*set forth items, dates, and amounts.*]

That the following items in said account were wrongly and fraudulently charged against defendant by plaintiff: [*state the items and show the errors, and facts showing the fraudulent character of the charges.*]

That on the — day of —, 18—, defendant notified plaintiff thereof, and requested that the same be corrected and the account restated, which plaintiff refused.

That said erroneous, wrongful, and fraudulent charges amount to the sum of — dollars, being more than the balance found to be due the plaintiff on said accounting, and other items are true and correct.

Wherefore, he demands judgment for costs. [Signature.]

See COMPLAINT—ACCOUNT STATED, p. 16, Form 27, and note.

ARBITRATION AND AWARD.

461.—Statutory arbitration.

[Caption and commencement.]

That on the — day of —, 18—, plaintiff and defendant, by a written instrument, a copy of which is filed herewith, and made a part of this answer, marked Exhibit A, submitted to the arbitration of the arbitrators therein named, all matters in dispute between them, including the claim of plaintiff sued on in this action, and agreed therein that said submission should be made a rule of the — Circuit Court.

Whereupon, plaintiff and defendant executed bonds each to the other in the sum of — dollars, conditioned that they would abide and faithfully perform the award of said arbitrators.

That on the — day of —, 18—, the matters submitted came on for hearing before said arbitrators, who, being first duly sworn, proceeded to the hearing thereof, plaintiff and defendant both being present; and, after hearing the evidence, made their award in writing, a copy of which is filed herewith, and made a part of this answer, marked Exhibit B.

That on the — day of —, 18—, true copies of said award and costs were served on plaintiff and defendant.

That plaintiff failed and refused to comply with said award; and, defendant, on the — day of —, 18—, filed said award, together with said agreement of submission, in the said — Circuit Court, and caused due proof to be made in said court of said submission and award, and of service of a copy thereof, on the defendant. Whereupon, said submission and award were, by order of said court, duly entered of record, and a rule granted against plaintiff to show cause why judgment should not be rendered on said award.

That on the — day of —, 18—, plaintiff appeared and answered to said rule, by filing objections to said award [*or allege failure to appear and a default*]; and the court having heard the evidence confirmed said award and rendered judgment in accordance therewith.

Wherefore, etc. [Signature.]

[Copy of submission and award.]

462.—Common-law arbitration.

[*Caption and commencement.*]

That on the — day of —, 18—, plaintiff and defendant submitted to the arbitration of A. B. and C. D. the claim sued on by plaintiff in this action.

That on the — day of —, 18—, said arbitrators, having previously undertaken said arbitration, found, by their award filed herewith, and made a part of this answer, that there was due the plaintiff thereon the sum of — dollars, and awarded him said sum, which the defendant then paid to plaintiff.

Wherefore, etc.

[*Signature.*]

[*Copy of award.*]

1. Necessary allegations. Ante, vol. 1, § 599, vol. 3, pp. 104–106, and notes; *Dilks v. Hammond*, 86 Ind. 563; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578. See also ante, vol. 2, §§ 1279–1291.

463.—Objection to confirmation of award on rule to show cause.

[*Court and venue.*]

In the matter of the award between — and —.

—, for answer to the rule to show cause herein, objects to the confirmation of the award, on the following grounds:

1. Said award was obtained by fraud, in this: [*state the facts constituting the fraud.*]

2. The arbitrators [*or*, —, one of the arbitrators] were [*was*] guilty of misconduct, in this: [*state in what the misconduct consisted.*]

3. That the arbitrators exceeded their powers, in this: [*state in what respect.*]

Wherefore, he asks that said award be not confirmed or judgment rendered thereon.

[*Signature.*]

1. Grounds of objection—Necessary allegations. Ante, vol. 2, § 1286; *Beeber v. Bevan*, 80 Ind. 31; *Russell v. Smith*, 87 Ind. 457.

464.—Common law arbitration—Relationship or interest of arbitrator.

[*Caption and commencement.*]

The defendant admits the submission of said matter to arbitration, but alleges that —, one of said arbitrators, was related to the plaintiff, being his first cousin [*or*, was interested in the result of said arbi-

tration, in this: (*state his interest*)], [*or, was biased and prejudiced against defendant, and had expressed himself against him, and in favor of plaintiff, on various occasions, and had expressed the opinion that defendant was in the wrong*], which was unknown to defendant until after said award was made.

That upon learning the fact, defendant immediately notified plaintiff thereof, and that he would not be bound by said award.

Wherefore, etc.

[*Signature.*]

1. Necessary allegations. *Carson v. Earlywine*, 14 Ind. 256; *Conrad v. Johnson*, 20 Ind. 421; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Russell v. Smith*, 87 Ind. 457; *Beeber v. Bevan*, 80 Ind. 31.

ASSAULT AND BATTERY.

465.—Defense of self or another.

[*Caption and commencement.*]

That immediately before the alleged assault in the complaint stated, the plaintiff assaulted the defendant [*or, —, the wife of defendant*] [*or, —, defendant's son*], and would have beaten and ill-treated him [*her*] if defendant had not defended himself [*her*] [*him*] against plaintiff; and, in order to defend himself [*her*] [*him*], he necessarily and unavoidably struck and beat plaintiff, using no more force than was necessary, which was the assault and battery alleged in the complaint.

Wherefore, he demands judgment for costs.

[*Signature.*]

1. When the use of force is justifiable in defense of one's self or another. *Baker v. Gausen*, 76 Ind. 317; *Steinmetz v. Kelly*, 72 Ind. 442; *Waybright v. The State*, 56 Ind. 122; *Moore's Crim. Law*, § 574.

2. Act done in sport no defense. *Peterson v. Haffner*, 59 Ind. 130.

3. Contributory negligence, when a defense. Where the act is purposely done, the question of mere negligence, on the part of the plaintiff, is immaterial. *Steinmetz v. Kelly*, 72 Ind. 442.

Therefore it is not necessary to negative the fact of contributory negligence in the complaint. But it may be affirmatively shown by answer that the injury was unintentionally done, and that the negligence of plaintiff contributed thereto. *Peterson v. Haffner*, 59 Ind. 130; *Steinmetz v. Kelly*, 72 Ind. 442; *Brown v. Kendall*, 6 Cush. 292.

4. Agreement to fight not a bar to the action. *Adams v. Waggoner*, 33 Ind. 531.

466.—Defense of property.

[*Caption and commencement.*]

That at the time of the alleged assault and battery, defendant was the owner, and in possession, of a certain dwelling-house, and occupying the same as a residence with his family.

That the plaintiff was in said dwelling-house, and defendant requested him to leave the same; but he refused, and defendant, for the purpose of removing him therefrom, laid hands upon him, and, without unnecessary or unreasonable force, but using no more force than was necessary for that purpose, removed him from his said dwelling; and this is the assault and battery complained of in plaintiff's complaint.

Wherefore, he demands judgment for costs.

[*Signature.*]

1. **Right to defend property or its possession.** *Kunkle v. The State*, 32 Ind. 220; *De Forest v. The State*, 21 Ind. 23; *Steinmetz v. The State*, 72 Ind. 442; *Moore's Crim Law*, § 859.

See COMPLAINT, p. 28.

ATTACHMENT AND GARNISHMENT.

467.—Exemption of property attached.

[*Caption.*]

The defendant, for answer to the attachment proceedings herein, alleges:

That he is now, and has been for —, a resident householder of the county of —, State of Indiana, and as such entitled to the benefit of the exemption laws of this state.

That he was, at the time the writ of attachment herein was issued and levied, and still is, the owner of the property attached in this action.

That the same was attached by the sheriff under the writ of attachment herein on the — day of —, 18—.

That on the — day of —, 18—, while said sheriff held said property under said writ of attachment, the defendant made out and delivered to said sheriff an inventory of all of his real estate within or without this state, money on hand or on deposit within or without this state, rights, credits, and choses in action, and all personal property of every description whatever belonging to him, or in which he had any interest at the date of the issuing of said writ, to which was attached the affidavit of the defendant that such inventory contained a full and

true account of all of the property of the defendant, or in which he had any interest, as set out therein.

That said inventory included the property attached in this action [and the whole thereof was of the value of less than six hundred dollars].

That upon delivering said inventory and affidavit to the sheriff he demanded that said property be appraised, which was done, and the appraised value of the whole of plaintiff's property, including that attached, amounted to — dollars. [*If the property amounted to more than six hundred dollars, and a part only is claimed as exempt, say: That after said property was appraised the defendant selected the following parts thereof as exempt, the appraised value of each item being as stated: [here state the items of property claimed as exempt, with the appraised value of each.]*]

Whereupon, said sheriff set off said property to defendant as exempt from said attachment. [*If the sheriff has refused to appraise or set off the property allege the facts as in Form 293, p. 393, and ask that it be declared exempt.*]

Wherefore, the defendant asks that said property be declared exempt from said attachment, and that the same be set off to him free from the lien thereof. [Signature.]

1. Right to exemption, and how obtained. Ante, vol. 2, §§ 1162, 1163, 1164, 1336; vol. 3, p. 634, Form 1020, and note; *Douch v. Rahner*, 61 Ind. 64; *Haas v. Shaw*, 91 Ind. 384.

2. Necessary allegations. In the case of *Haas v. Shaw*, 91 Ind. 384, it is said that the answer of the defendant contained "much irrelevant and unnecessary matter." The answer attempted to set out the steps taken necessary to entitle the defendant to have the property set off to him. That these steps must be taken to entitle a debtor to any property as exempt is clear. Ante, vol. 2, §§ 1162, 1336.

But is it necessary to set out specifically in the answer the facts showing a compliance with the statute, or is it sufficient to allege in general terms that the debtor has made and delivered to the sheriff his inventory and affidavit as required by law? The mere allegation that a proper inventory and affidavit have been filed would seem to be a conclusion of law, and but for the language used in the case above cited I should say unhesitatingly that the facts must be specifically set out. *Huseman v. Sims*, 4 North-east Rep. 42.

3. Denial of grounds of attachment. Ante, p. 337, Form 454.

467.—Answer of garnishee.

[Caption.]

—, garnishee herein, for answer to the affidavit in garnishment, denies that he has property of the defendant of any description in his

possession or under his control, or that he is indebted to the defendant, or has the control or agency of any property, moneys, credits, or effects of the defendant.

[Or, alleges that he is indebted to the defendant in the sum of — dollars, and no more, which sum he paid to the sheriff on the — day of —, 18— (or, now brings into court and asks to be allowed to pay the same to the clerk of the court), for the use of the party entitled thereto.]

[Or, That on the — day of —, 18—, he executed to defendant a promissory note for the sum of — dollars, payable — months after date, with — per cent interest from date until paid, which note the defendant still holds, but he alleges that said note was given without any consideration, and he is not otherwise indebted to defendant.]

[Or, That on the — day of —, 18—, he executed to defendant his promissory note for the sum of — dollars, due — months after date, with — per cent interest, payable at the — Bank, at —, Indiana.

That before the maturity of said note, and before the service of garnishment herein, the defendant, for a valuable consideration, indorsed the same to one —, who now holds the same, and that this garnishee is not otherwise indebted to defendant.]

[Or, That he is indebted to defendant in the sum of — dollars, but the same does not fall due until the — day of —, 18—.]

Wherefore, he demands judgment.

[Signature.]

1. What defenses garnishee may make. Ante, vol. 2, § 1325; *Newman v. Manning*, 89 Ind. 422; *First Nat. Bank of Indianapolis v. Armstrong*, 101 Ind. 244.

For further forms under this head, see **ATTACHMENT AND GARNISHMENT**, post, p. 525; **JUDGMENTS**, p. 448.

BAILMENTS.

169.—Action against bailee for failure to deliver or account for property—Loss of by fire.

[Caption and commencement.]

That he admits that he received from the plaintiff, to be kept for him, and delivered on demand, the property described in the complaint, but alleges that he stored the same in his warehouse at —, and kept the same therein until the — day of —, 18—, when said warehouse and all its contents, including the property of plaintiff,

were, without any fault or negligence on defendant's part, accidentally destroyed by fire.

That plaintiff had not at any time demanded said property from defendant.

Wherefore, he demands judgment for costs. [Signature.]

1. Necessary allegations. *Rice v. Nixon*, 97 Ind. 97. See ante, p. 31-34.

BANKS.

470.—Forgery of certified check.

[Caption.]

The defendant admits that it certified the check sued on in this action, but alleges that said check is a forgery, in this: [*state what alteration has been made, e. g.*] That said check was drawn by — for the sum of — dollars, but the same was altered and changed by some one unknown to defendant, by raising said sum of — to — dollars.

That defendant had no knowledge, at the time it certified said check, that the same had been so altered, but discovered the same afterward. [Signature.]

1. Effect of certifying check. Ante, Form 83, p. 48; *Parke v. Roser*, 67 Ind. 500.

2. Acceptance of forged paper, effect of. *Allen v. Sharpe*, 37 Ind. 67; post, Form 473, p. 348.

471.—Application of money deposited on debt of depositor to bank.

[Caption.]

The defendant admits that the plaintiff deposited money with the defendant, but says that the same was a general deposit, and that on the — day of —, 18—, plaintiff executed to defendant his promissory note for the sum of — dollars, payable — months after date, with — per cent interest. That said note matured on the — day of —, when there was due thereon the sum of — dollars, and the plaintiff then had on deposit, as aforesaid, the sum of — dollars, which sum the defendant applied upon said note, in partial payment thereof.

Wherefore, the defendant demands judgment for costs. [Signature.]

1. When bank may apply deposit to indebtedness of depositor. Ante, vol. 1, § 656; *The Second Nat'l Bank of Lafayette v. Hill*, 76 Ind. 223;

Scott v. Shirk, 60 Ind. 160; Coffin v. Anderson, 4 Blkf. 395; The Bank of the State v. Burton, 27 Ind. 426; Wilson v. Dawson, 52 Ind. 513. See also ante, p. 000; Harrison v. Wright, 100 Ind. 515.

See SET-OFF, p. 403.

BILLS, NOTES, AND CHECKS.

For forms applicable to bills and notes, as well as other contracts, see: ACCORD AND SATISFACTION, p. 339; ARBITRATION AND AWARD, p. 341; CHAMPERTY, p. 350; CONSIDERATION, p. 354; CONTRACTS, p. 128; COVENANTS, p. 358; COVERTURE, p. 360; DRUNKENNESS, p. 361; DURESS, p. 362; ESTOPPEL, p. 363; FORMER AJUDICATION, p. 366; FRAUD, p. 367; GUARANTY, pp. 156, 368; INFANCY, p. 371; INSURANCE, p. 172; JUDGMENTS, pp. 182, 377; MISTAKE, p. 222; MORTGAGES, p. 228; NOVATION, p. 386; PATENT RIGHT, p. 389; PAYMENT, p. 390; PRINCIPAL AND SURETY, p. 265; RELEASE, p. 396; SALES, p. 282; SPECIFIC PERFORMANCE, p. 297; TENDER, p. 398; USURY, p. 400; WARRANTY, p. 314, 401.

472.—General denial, and denial of execution of instrument.

[Caption.]

The defendant, for answer to plaintiff's complaint, alleges:

1. That he denies each and every allegation thereof.
2. That he did not execute the note [bill of exchange] [check] sued on in this action.

Wherefore, he demands judgment for costs.

[Signature.]

[Verification of second paragraph.]

1. See Answers in Denial, p. 337; ante, vol. 1, § 578, et seq; 588.

473.—Payment.

[Caption and commencement.]

That he fully paid the note [bill of exchange] [check] sued on before the bringing of this action.

[Signature.]

1. What sufficient answer of payment. Ante, vol. 1, § 594, et seq; vol. 3, ante, p. 339, post, p. 545.

474.—Alteration of note.

[Caption.]

The defendant, —, for separate answer to plaintiff's complaint, admits that he signed a note payable to plaintiff, but alleges that he

signed and executed the same, together with the defendant, —, and thereafter, without the knowledge or consent of this defendant, the plaintiff materially altered and changed said note, in this: [*state in what the alteration consists, e. g.*] He procured the same to be signed by one — [or, raised said note from the sum of — dollars, the amount for which it was given, to — dollars] [or, erased therefrom the name of —, who signed the same, as a joint maker, with this defendant] without the knowledge or consent of this defendant.

[*Verification.*]

[*Signature.*]

1. Necessary allegations. The fact that the instrument sued on has been so altered that it is not the note of the defendant, may be proved under a denial of the execution of the note. And where the alteration is of the instrument which is the foundation of the action, this is the better practice; but the alteration may be specifically alleged. In either case, however, where the answer goes to an instrument which is the foundation of the action, it must be verified. *Ante*, vol. 1, § 610; *Holland v. Hatch*, 11 Ind. 497; *Coburn v. Webb*, 56 Ind. 96.

2. When alteration is material. *Bell v. The State Bank*, 7 Blkf. 456; *Holland v. Hatch*, 11 Ind. 497; *Henry v. Coats*, 17 Ind. 161; *Bowers v. Briggs*, 20 Ind. 139; *Grimes v. Piersol*, 25 Ind. 246; *Piersol v. Grimes*, 30 Ind. 129; *Shanks v. Albert*, 47 Ind. 461; *Cochran v. Nebeker*, 48 Ind. 459; *Bucklen v. Huff*, 53 Ind. 474; *Coburn v. Webb*, 56 Ind. 96; *The Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134; *Schnewind v. Hackett*, 54 Ind. 248; *Crandall v. The First Nat'l Bank of Auburn*, 61 Ind. 349; *Brooks v. Allen*, 62 Ind. 401; *Hayes v. Matthews*, 63 Ind. 412; *Hamilton v. Wood*, 70 Ind. 306; *McCoy v. Lockwood*, 71 Ind. 319; *Bowser v. Rendell*, 81 Ind. 128; *Voiles v. Green*, 43 Ind. 374; *Nicholson v. Combs*, 90 Ind. 515; *Ballard v. Franklin Life Ins. Co.*, 81 Ind. 239; *Alleman v. Wheeler*, 101 Ind. 141.

3. Renders the whole note void. Where the alteration consists in adding an additional clause which changes the legal effect of the note, it might be said with some reason that the maker should be held liable thereon according to the promise actually made. But it is firmly held in this state that the note must be regarded as totally void, and that there can be no recovery. *Holland v. Hatch*, 11 Ind. 497; *Schnewind v. Hackett*, 54 Ind. 248; *Dietz v. Harder*, 72 Ind. 208.

4. What defenses may be made against commercial paper. *Ante*, vol. 1, § 38.

475.—That acceptance was for accommodation.

[*Caption.*]

The defendant, for answer to plaintiff's complaint, alleges:

That he accepted the bill mentioned in the complaint for the accommodation of — [plaintiff], and that there was no consideration for the acceptance or payment of said bill by defendant.

[If the action is by an indorsee, say: That plaintiff received said bill after maturity without consideration, and with full knowledge that defendant accepted the same without consideration.]

Wherefore, defendant demands judgment for costs. [Signature.]

1. Against whom defense may be made. *Spurgin v. McPheeters*, 42 Ind. 527; ante, Form 100, p. 57, and notes.

2. Necessary allegations against indorsee. *Hinkley v. The Fourth Nat'l Bank of St. Louis*, 77 Ind. 475.

For further forms applicable to contracts generally, see under particular defenses.

BONDS AND UNDERTAKINGS.

See under particular defenses applicable to all contracts.

BREACH OF PROMISE.

476.—Defense of want of chastity.

[Caption.]

The defendant, for answer to plaintiff's complaint, alleges:

That at the time of making the promise alleged in the complaint, plaintiff was unchaste; but the same was then unknown to defendant; and on the — day of —, 18—, without the connivance of defendant, had illicit carnal intercourse with one —; but defendant was then ignorant thereof; and, as soon as he was informed thereof, refused to marry plaintiff.

Wherefore, etc.

[Signature.]

1. Failure to prove answer of unchastity does not increase damages. *Hunter v. Hatfield*, 68 Ind. 416.

2. Necessary allegations. *Bell v. Eaton*, 28 Ind. 468.

3. What may be proved under general denial. *Shellenbarger v. Blake*, 67 Ind. 75.

4. What will amount to former adjudication. *Ireland v. Emmer-son*, 93 Ind. 1.

See COMPLAINT for BREACH OF PROMISE, ante, p. 141, and notes.

CHAMPERTY—MAINTENANCE.

477.—General form.

[Caption.]

The defendant, for answer to plaintiff's complaint, alleges:

That the defendant, at the time of the making of the contract sued on herein, claimed to be the owner by inheritance of a large amount

of real and personal estate in —, which was in dispute [*or state any other cause of action or claim*].

That he agreed with plaintiff to pay him the amount sued for herein [*or, convey him the property claimed in the complaint*], in consideration that plaintiff, who was then an attorney at law, would sue for and recover said property, and pay all expenses and costs of any action or proceeding necessary to be brought or prosecuted [plaintiff to have for his services, and costs paid by him, one — of the property recovered].

That there was no other or different consideration for defendant's promise alleged in the complaint.

Wherefore, he asks that said contract be declared void, and that he have judgment for costs. [Signature.]

1. When contract void for champerty. *Scobey v. Ross*, 13 Ind. 117; *West v. Raymond*, 21 Ind. 305; *Lafferty v. Jelley*, 22 Ind. 471; *Stotsenburg v. Marks*, 79 Ind. 193; *Rowe v. Becket*, 30 Ind. 154; *Puett v. Beard*, 86 Ind. 172; *Elliot v. Frakes*, 90 Ind. 389.

2. What will amount to maintenance. *Quigley v. Thompson*, 53 Ind. 317; *Stotsenburg v. Marks*, 79 Ind. 193.

COMMON CARRIER.

478.—Limitation of liability by special contract.

[*Caption and commencement.*]

That defendant admits that the goods mentioned in the complaint were shipped on defendant's cars, and were damaged, as alleged, but says that the same were shipped under a special contract, a copy of which is filed herewith, and made a part of this complaint.

That defendant fully complied with the conditions of said contract on his part to be performed, and said injury and damage resulted without the fault or negligence of defendant.

That plaintiff did not comply with the conditions of said contract, in this: [*state the facts.*]

That, by reason of the plaintiff's failure to comply with said contract and of his acts above stated, said injury resulted.

[*Or, That while defendant was transporting said goods, under said contract, with all proper diligence and ordinary care, the same was, without any fault or negligence on defendant's part, destroyed by (state the destruction, by some means excepted in the special contract) .*]

Wherefore, defendant demands judgment for costs. [Signature.]

1. Effect of special contract. As to the extent to which a common carrier may be relieved by special contract from the strict liability imposed by law, see *The Adams Express Co. v. Reagan*, 29 Ind. 21; *Indianapolis, etc., R. R. Co. v. Cox*, 29 Ind. 360; *Indianapolis, etc., R. R. Co. v. Allen*, 31 Ind. 394; *The Michigan, etc., R. R. Co. v. Heaton*, 37 Ind. 448; *The Adams Express Co. v. Fendrick*, 38 Ind. 150; *The St. Louis, etc., Ry. Co. v. Smuck*, 49 Ind. 302; *Bartlett v. The Pittsburg, etc., Ry. Co.*, 94 Ind. 281; *Rosenfeld v. Peoria, etc., Ry. Co.*, 103 Ind. 121; *Fry v. Louisville, etc., Ry. Co.*, 103 Ind. 265.

2. Necessary allegations. It will be seen by the above authorities that a common carrier can not, by special contract, relieve itself from liability from loss occurring through its negligence, no matter how slight, nor where its negligence in any way contributed to the loss. This is placed, in some of the cases, on the ground that such a contract would be against public policy. To make the answer good, therefore, under these authorities, it must set up the special contract, show that the loss was by some one of the causes excepted by it, and without the fault or negligence of the common carrier. *The St. Louis, etc., Ry. Co. v. Smuck*, 49 Ind. 302; *Bartlett v. The Pittsburg, etc., Ry. Co.*, 94 Ind. 281.

And if the contract is not clear in its meaning it will be construed most strongly against the common carrier. *The St. Louis, etc., Ry. Co. v. Smuck*, 49 Ind. 302.

479.—Failure to deliver—Property stolen without defendant's fault.

[Caption and commencement.]

That defendant admits that the goods mentioned in the complaint were shipped and directed as alleged therein, but says that defendant safely carried said goods to said city of —, and to the address of said —, at said city, as marked on said package and contained in the bill of lading, but found that said — did not reside or do business at said place.

That defendant thereupon made diligent search for said —, and found that he did not reside or do business at —, and was not there.

That defendant made inquiry of various persons in said city as to the whereabouts of said —, and found that he formerly resided at the place to which said package was addressed, but could not, after diligent and careful inquiry in said neighborhood and throughout said city learn where he had gone or his present residence.

That defendant immediately notified —, who shipped said goods, that — could not be found, and placed said package [*state where, howing it to be a safe and proper place for keeping goods of the kind*], and kept and cared for the same in a proper and careful manner, but on the — day of —, 18—, without the fault or negligence of defendant, said — [*place where goods were kept*] was broken into by some one unknown to defendant, and said goods were, without any fault or

negligence on plaintiff's part, stolen therefrom, and have not been recovered.

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations. If the common carrier is unable to find the consignee, it must take proper care of the goods and use such care as would be required of a bailee for hire, and the loss thereafter may be excused by a showing that it occurred without defendant's fault. But the answer must first clearly show, *by a statement of the facts*, that due diligence was used to find the consignee, that he could not be found, and that thereafter the goods were properly cared for, and the loss occurred without the defendant's fault. *The American Ex. Co. v. Hockett*, 30 Ind. 250; *Bausemer v. The Toledo, etc., Ry. Co.*, 25 Ind. 434; *Adams Ex. Co. v. Darnell*, 31 Ind. 20; *The Green, etc., Nav. Co. v. Marshall*, 48 Ind. 596.

3. Duty as to delivery. In the case of common carriers by vessels on the seas, lakes, or navigable rivers, or by railroads, it is not necessary that the goods should be delivered at the residence or place of business of the consignee. The proper place of delivery is at their wharves or depots, and from the time of their delivery at the wharf or depot the liability of a common carrier ceases and that of a bailee for hire attaches. *Bausemer v. The Toledo, etc., Ry. Co.*, 25 Ind. 434; *American Ex. Co. v. Hockett*, 30 Ind. 250.

Express companies are required to deliver to the consignee in person. *Adams Ex. Co. v. Darnell*, 31 Ind. 20.

As to the duty of common carriers to deliver goods generally, see *The Michigan, etc., R. R. Co. v. Bivens*, 13 Ind. 263; *Bausemer v. The Toledo, etc., Ry. Co.*, 25 Ind. 434; *Jeffersonville, etc., R. R. Co. v. Cotton*, 29 Ind. 498; *American Ex. Co. v. Hockett*, 30 Ind. 250; *The Toledo, etc., Ry. Co. v. Hammond*, 33 Ind. 379; *Cincinnati, etc., R. R. Co. v. McCool*, 26 Ind. 140; *Pittsburg, etc., Ry. Co. v. Nash*, 43 Ind. 423; *The Green, etc., Nav. Co. v. Marshall*, 48 Ind. 596; *McCulloch v. McDonald*, 91 Ind. 240. See p. 124, Form 168, and note.

4. Notice, when necessary, and to whom given. *The Michigan, etc., R. R. Co. v. Bivens*, 13 Ind. 263; *The Green, etc., Nav. Co. v. Marshall*, 48 Ind. 596; *The Ohio, etc., Ry. Co. v. Yoke*, 51 Ind. 181.

5. Goods taken from carrier by legal process. *The Ohio, etc., Ry. Co. v. Yoke*, 51 Ind. 181.

6. Riot, when relieves from liability. *The Pittsburg, etc., Ry. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore, etc., Ry. Co. v. Bennett*, 89 Ind. 457; *Bartlett v. The Pittsburg, etc., Ry. Co.*, 94 Ind. 281.

For FORMS OF COMPLAINT, see ante, p. 124-127.

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COMPROMISE.

480.—General form.

[*Caption and commencement.*]

That on the — day of —, 18— [after the bringing of this action], plaintiff and defendant having mutual and valid claims and demands against each other, about which there was a disagreement and dispute as to the amount due thereon, had a full and final settlement of said claims and a compromise of this action, in which it was agreed that plaintiff would dismiss this action and pay all costs, in consideration of which defendant agreed to pay him [on the — day of —, 18—], and did pay him, the sum of — dollars.

Wherefore, defendant demands judgment for costs. [*Signature.*]

1. Consideration. As to what is a sufficient consideration to uphold a compromise, see ACCORD AND SATISFACTION, ante, p. 339; *Spahr v. Hollingshead*, 8 Blkf. 415; *Jarvis v. Sutton*, 3 Ind. 289; *Thompson v. Nelson*, 28 Ind. 431; *Smith v. Borum*, 75 Ind. 412; *Schnell v. Nell*, 17 Ind. 29; *Coy v. Stucker*, 31 Ind. 161; *Dodge v. Manchester*, 58 Ind. 429.

See CONSIDERATION, p. 354-357.

CONSIDERATION.

481.—Want of consideration.

[*Caption and commencement.*]

That the note [bill of exchange], [writing sued on] was given without any consideration.

Wherefore, defendant demands judgment. [*Signature.*]

1. May be pleaded in general terms. Ante, vol. 1, § 600; *Beard v. Lofton*, 102 Ind. 408.

2. When must be specially pleaded. Ante, vol. 1, § 600.

3. Who may plead want of consideration. R. S. 1881, § 366; ante, vol. 1, § 601; *Moyer v. Brand*, 102 Ind. 301.

482.—Partial want of consideration.

[*Caption.*]

The defendant, for answer to all of plaintiff's claim in excess of — dollars, alleges:

That the note sued on herein was given in consideration of the conveyance to defendant of a fee-simple title to two tracts of land described as follows: [*describe them*], for which plaintiff executed to de-

defendant his deed of general warranty, a copy of which is filed herewith, and made a part hereof.

That of the amount for which said note was given, — dollars thereof was in consideration of the conveyance of the title to the first described tract of said land, and for no other consideration.

That the plaintiff had not, at the time said note was given, and has not since had, any title to said tract of land, and defendant has not obtained the title thereto, or the possession thereof.

Wherefore, etc.

[Signature.]

1. Necessary allegations. *Beal v. Beal*, 79 Ind. 280; ante, vol. 1, §§ 619-623; ante, p. 137 et seq. post, p. 389 et seq.

483.—Another form.

[Caption.]

The defendant, in answer to all of the amount sued on in excess of — dollars, alleges:

That the note sued on as to such excess was given without any consideration therefor.

Wherefore, etc.

[Signature.]

1. Partial want of consideration may be pleaded. R. S. 1881, § 366; ante, vol. 1, § 600; *Webster v. Parker*, 7 Ind. 185; *Moore v. Boyd*, 95 Ind. 134.

2. Necessary allegations. It is held that a partial want of consideration may be pleaded in general terms. *Moore v. Boyd*, 95 Ind. 134.

But the answer must show what part of the cause of action it is intended to meet, and must be confined to that part in terms. If it professes to answer the whole complaint, it is bad. Ante, vol. 1, § 588; *Manly v. Hubbard*, 9 Ind. 230.

484.—Against indorsee of commercial paper.

[Caption and commencement.]

That the note sued on herein was given without any consideration, and the plaintiff took the same after it fell due [or, with knowledge that the same was given without consideration].

Wherefore, etc.

[Signature.]

1. When good defense against indorsee of commercial paper. R. S. 1881, § 366; ante, vol. 1, § 601; *Collier v. Waugh*, 64 Ind. 456; *Hunter v. McLaughlin*, 43 Ind. 38.

485.—Illegal consideration.

[Caption and commencement.]

That the consideration for the note sued on was illegal, in this: [state the facts showing its illegality, e. g.] That the defendant was, at

the time of executing the note, charged with the crime of — [state what] [and had been indicted therefor in the — Circuit Court]; and plaintiff, to induce defendant to execute said note, represented that he could suppress and prevent said prosecution; and, in consideration of plaintiff's promise to suppress said prosecution and cause the same to be dismissed, and for no other consideration, defendant executed to him said note.

[Or, That at the time said note was given, a suit by the defendant against the plaintiff for divorce, was pending in the — Circuit Court, and the same was given in consideration of the promise that plaintiff would not appear and defend said action, and for no other consideration.]

Wherefore, defendant says the consideration for said note was illegal and void, and he demands judgment. [Signature.]

1. Facts showing illegality must be pleaded. It is not sufficient to allege, generally, that the consideration was illegal. The facts showing its illegality must be set out. *Ante*, vol. 1, § 602.

2. When affects part of contract only. *Ante*, vol. 1, § 602; *Everhart v. Puckett*, 73 Ind. 409; *James v. Jellison*, 94 Ind. 292; *Hynds v. Hays*, 25 Ind. 31.

3. What is an illegal consideration. *Barnett v. Spencer*, 4 Blkf. 206; *Wright v. Hughes*, 13 Ind. 109; *Ensley v. Patterson*, 19 Ind. 95; *Collier v. Waugh*, 64 Ind. 456; *Everhart v. Puckett*, 73 Ind. 409; *Crowder v. Reed*, 80 Ind. 1; *Whitesides v. Hunt*, 97 Ind. 191; *Stout v. Turner*, 102 Ind. 418.

486.—Failure of consideration.

[Caption and commencement.]

That the note sued on was given in consideration of the promise of plaintiff that he would sell and deliver to defendant goods and merchandise from the store of plaintiff, then in business at —, as the same might, from time to time, be ordered by defendant, during the year —, not exceeding the amount of said note.*

That thereafter defendant, during the year —, ordered goods from plaintiff to the amount of said note; but plaintiff failed and refused to deliver the same, or any part of them.

[Or, if there is only a partial failure, say: For answer to all of said note in excess of — dollars, the defendant says that: [*allege facts, as above, to **.] That on the — day of —, 18—, on defendant's order, plaintiff delivered to defendant goods to the amount of — dollars.

That defendant thereafter, during said year, gave orders to plaintiff, at various times, for goods amounting in the aggregate to — dollars,

the balance of the amount of said note; but plaintiff failed and refused to deliver the same, or any part of them, and defendant has received no more than said amount of — dollars.]

And this was the only consideration for said note.

Wherefore, defendant says the consideration of said note has failed [to the extent of — dollars], and he demands judgment.

[Signature.]

1. Facts showing failure must be pleaded. Ante, vol. 1, §§ 603, 604.

2. What will amount to a failure of consideration. Ante, vol. 1, § 603; *McFadden v. Blair*, 72 Ind. 365; *Jones v. Hathaway*, 77 Ind. 14; *Jessop v. Trout*, 77 Ind. 194; *Booth v. Fitzer*, 82 Ind. 66.

3. Necessary allegations. Ante, vol. 1, §§ 603, 604.

CONTRACTS.

For special defenses, see: **ACCORD AND SATISFACTION**, p. 339; **ARBITRATION AND AWARD**, p. 341; **CHAMPERTY AND MAINTENANCE**, p. 350; **CONSIDERATION**, p. 354; **COVENANTS**, p. 137; **COVERTURE**, p. 360; **DRUNKENNESS**, p. 361; **DURESS**, p. 362; **ESTOPPEL**, p. 363; **FORMER ADJUDICATION**, p. 366; **FRAUD**, p. 367; **GUARANTY**, p. 156; **INFANCY**, p. 371; **INSURANCE**, p. 172; **JUDGMENTS**, p. 182; **MISTAKE**, p. 222; **MORTGAGE**, p. 228; **NOVATION**, p. 386; **PATENT RIGHT**, p. 389; **PAYMENT**, p. 390; **PRINCIPAL AND SURETY**, p. 265; **RELEASE**, p. 396; **SALES**, p. 282; **SPECIFIC PERFORMANCE**, p. 297; **TENDER**, p. 398; **USURY**, p. 400; **WARRANTY**, p. 401.

CORPORATIONS.

487.—Failure of foreign corporation to comply with statute.

[Caption.]

The defendant, for answer to plaintiff's complaint, alleges:

That the plaintiff is a foreign insurance company, organized under the laws of the State of —, and doing business in this state.

That the note sued on herein was given in consideration of a policy of insurance, then issued by plaintiff to defendant upon a contract of insurance entered into at —, in this state, with one —, claiming to be the duly authorized agent of plaintiff for the county of —, in this state, and for no other consideration.

That plaintiff had not then, nor has it since, furnished to the auditor of this state the sworn, or any, statement of its president or secretary, as required by section 3765 of the Revised Statutes of 1881;

nor has it at any time procured from the auditor of state a certificate, authorizing the said — to transact business in said county of —; nor has the plaintiff, at any time, filed any such certificate or a copy thereof, or any renewal thereof, or a certified copy of any statement of the president or secretary of the plaintiff, in the office of the clerk of the circuit court of said county, as required by law.

Wherefore, defendant demands judgment for costs. [*Signature.*]

2. Is this an answer in bar or in abatement? It has been directly held that the facts set out in the foregoing form are in bar of the action. *Casaday v. The American Ins. Co.*, 72 Ind. 95. But see ante, Form 452, note, p. 335.

488.—Ultra vires.

[*Caption and commencement.*]

That plaintiff was not by law authorized to —, except for the following purposes and in the following manner:

[*If the corporation is organized under the general law, the court will judicially know its powers, and they need not be alleged.*]

The contract in the complaint stated was made and accepted by said corporation for the purpose of [*state the facts, showing the case is not within the powers possessed.*] [*Signature.*]

1. When acts of corporations ultra vires. *Browning v. The Board of Comr's of Owen Co.*, 44 Ind. 11; *State Board of Agr. v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Vanarsdall v. The State*, 65 Ind. 176; *Sturgeon v. The Board of Comr's, etc.*, 65 Ind. 302; *The Driftwood, etc., Tp. Co. v. The Board of Comr's, etc.*, 72 Ind. 226; *Burnett v. Abbott*, 51 Ind. 254; *Warren County, etc., Co. v. Barr*, 55 Ind. 30; *Harney v. The Indianapolis, etc., R. R. Co.*, 32 Ind. 244; *The Board of Comr's, etc., v. Deprez*, 87 Ind. 509; *Leonard v. American Ins. Co.*, 97 Ind. 299.

2. Public corporation may plead its own want of power. *The Driftwood, etc., Tp. Co. v. The Board of Comr's, etc.*, 72 Ind. 226.

3. When private corporation may make the defense. *Leonard v. The American Ins. Co.*, 97 Ind. 299.

See ANSWERS IN ABATEMENT, p. 334.

COVENANTS.

489.—Want of title.

[*Caption and commencement.*]

That the note sued on herein was given in consideration of a conveyance, by the plaintiff to the defendant, by a deed of general warranty [*or, in which he covenanted that he was seized and possessed of*

the real estate therein described by title in fee-simple], a copy of which is filed herewith, and made a part of this complaint.

That plaintiff had not, nor has he since obtained, any title to said real estate, or any part of it.

That defendant did not, by reason of plaintiff's want of title, obtain possession thereof, and is not now in possession. [Or, defendant took possession of said real estate; but was, on the — day of —, 18—, evicted therefrom, by one —, who was the owner in fee-simple and entitled to the possession thereof, and is now in possession.]

That there was no other consideration for said note.

Wherefore, defendant demands judgment for costs. [Signature.]

[Copy of deed.]

1. Necessary allegations. Ante, vol. 1, §§ 619–624, ante, p. 137 et seq, 354 et seq; *Small v. Reeves*, 14 Ind. 163; *Marvin v. Applegate*, 18 Ind. 425; *Jones v. Noe*, 71 Ind. 368; *Grubles v. Barber*, 102 Ind. 131; *Hume v. Dessar*, 29 Ind. 112.

2. Covenant of married woman. A want of title in the grantor, who is a married woman, is a good defense. Ante, vol. 1, § 624; *Beal v. Beal*, 79 Ind. 280.

490.—Against incumbrances.

[Caption and commencement.]

That the note sued on was given in consideration of the conveyance, by the plaintiff to defendant, by general warranty deed, a copy of which is filed herewith, and made a part of this complaint, of the fee-simple title to the real estate described in said deed.

That said real estate was, at the time of said conveyance and the execution of said note, incumbered by a mortgage given by plaintiff to one —, on the — day of —, 18—, to secure the payment of a promissory note of said date to said — for — dollars, payable — months after date, with — per cent interest.

That said mortgage was duly recorded in the recorder's office of — county on the — day of —, 18—, and was, at the time of said conveyance, a valid and subsisting lien on said real estate.

That plaintiff did not pay said indebtedness, or remove said incumbrance, and the defendant was compelled to and did, on the — day of —, 18—, pay the same to said —, amounting to the sum of — dollars, and said mortgage was thereby fully satisfied. [Or, show a foreclosure and sale, if so.]

Wherefore, defendant demands judgment for costs. [Signature.]

[Copy of deed.]

1. Necessary allegations. It is not enough to show an incumbrance. The answer must show a loss by the defendant, either by a foreclosure, or pay-

ment of a lien, which must be shown to be a valid one. Ante, vol. 1, § 622; vol. 3, p. 137 et seq; *Henry v. Gilliland*, 103 Ind. 177.

If the amount of loss by reason of the incumbrance is less than the amount due the plaintiff, the answer must be limited to an answer to so much of the complaint as is covered by such loss. Ante, vol. 1, §§ 588, 620, 622; vol. 3, pp. 137-141, 354-357.

For FORMS OF COMPLAINT on breach of COVENANTS, see ante, pp. 137-141.

COVERTURE.

491.—General form.

[*Caption and commencement.*]

That the defendant was, at the time she executed the ——— sued on herein [and still is], a married woman.

Wherefore, defendant demands judgment.

[*Signature.*]

1. **When coverture a good defense.** R. S. 1881, §§ 5115-5131; ante, vol. 1, § 624; *Beal v. Beal*, 79 Ind. 280; *Wulschner v. Sells*, 87 Ind. 71; *Haas v. Shaw*, 91 Ind. 384; *Rothschild v. Raab*, 93 Ind. 488; *Frazer v. Clifford*, 94 Ind. 482; *Mathes v. Shank*, 94 Ind. 501; *Burk v. Platt*, 88 Ind. 283; *Rinn v. Rhodes*, 93 Ind. 389; *Cupp v. Campbell*, 103 Ind. 213; *Arnold v. Engleman*, 103 Ind. 512.

See MORTGAGES, p. 000.

492.—Suretyship and coverture.

[*Caption and commencement.*]

That the defendant executed the ——— sued on, as the surety of [the defendant] ———, and received no consideration therefor.

That at the time she executed the same she was [and still is] a married woman.

Wherefore, she demands judgment.

[*Signature.*]

1. **Contract as surety void.** R. S. 1881, § 5119; *McCarty v. Tarr*, 83 Ind. 444; *Frazer v. Clifford*, 94 Ind. 482; *Levering v. Shockey*, 100 Ind. 558; *Allen v. Davis*, 101 Ind. 187; *Vogel v. Leichner*, 102 Ind. 55.

See ESTOPPEL, p. 363; INFANTS, p. 371; MORTGAGE, p. 386.

CRIMINAL CONVERSATION

See FORMS OF COMPLAINT for, ante, pp. 141-144.

DECEIT.

See FRAUD, pp. 152, 367.

DIVORCE.

493.—Condonation.

[Caption and commencement.]

That after the times of the grievances in the complaint mentioned, plaintiff, being informed and having full knowledge of the same, condoned said alleged acts and forgave defendant, and freely cohabited with defendant thereafter, and defendant has ever since acted toward plaintiff as a faithful and kind husband [wife].

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations. Phillips v. Phillips, 4 Blkf. 131; Lewis v. Lewis, 9 Ind. 105.

2. What amounts to condonation. Armstrong v. Armstrong, 27 Ind. 186; Sullivan v. Sullivan, 34 Ind. 368; Burns v. Burns, 60 Ind. 259; Rose v. Rose, 87 Ind. 481.

3. When must be specially pleaded. R. S. 1881, §§ 1032, 1033; Lewis v. Lewis, 9 Ind. 105; Rose v. Rose, 87 Ind. 481.

4. What may be proved under general denial. Armstrong v. Armstrong, 27 Ind. 186; Rose v. Rose, 87 Ind. 481.

See COMPLAINTS, pp. 145–147; CROSS-COMPLAINT, p. 409.

DRUNKENNESS.

494.—General form.

[Caption and commencement.]

That defendant admits the facts alleged in plaintiff's complaint; out alleges that at the time of making said contract he was so intoxicated as not to know or understand the business he was then transacting, or the effect of said contract, and was incapable, by reason of said intoxication, of executing the same.

That on the — day of —, 18—, after recovering from his intoxication, he notified plaintiff that he would not be bound by said contract, and that he rescinded the same, and tendered to plaintiff — [whatever was received by defendant as a consideration for his promise]; but plaintiff refused to accept the same.

Wherefore, defendant demands judgment.

[Signature.]

1. When a defense—Necessary allegations. Harbison v. Lemon, 3 Blkf 51; Doe v. Harter, 1 Ind. 427; Henry v. Ritenour, 31 Ind. 136; Jenners

v. Howard, 6 Blkf. 240; *Reinskopf v. Rogge*, 37 Ind. 207; *McGuire v. Callahan*, 19 Ind. 128; *Joest v. Williams*, 42 Ind. 565.

DURESS.

495.—Threat of prosecution for criminal offense.

[*Caption and commencement.*]

That defendant admits that he signed the — sued on, but says that plaintiff, to induce defendant to execute the same, charged defendant with having committed the crime of — [*state what*], and thereupon by force restrained defendant of his liberty, and threatened to have him arrested and imprisoned on said charge, and prosecuted therefor, if he did not execute said —.

That defendant, to free himself, and to avoid arrest and imprisonment, without consideration therefor, and against his will, signed and delivered said —.

That defendant was wholly innocent of said charge, and the same was made without any foundation.

Wherefore, defendant demands judgment.

[*Signature.*]

1. **What amounts to duress—Necessary allegations.** *Brooks v. Berryhill*, 20 Ind. 97; *The Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312; *The Town of Lagonier v. Ackerman*, 46 Ind. 552; *Bennett v. Ford*, 47 Ind. 264; *Modlin v. The North-western Tp. Co.*, 48 Ind. 492; *Bush v. Brown*, 49 Ind. 573; *Coffelt v. Wise*, 62 Ind. 451; *Line v. Blizzard*, 70 Ind. 23; *Adams v. Stringer*, 78 Ind. 175; *Butterfield v. Davenport*, 84 Ind. 590; *Hines v. Board of Comrs., etc.*, 93 Ind. 266; *Schee v. McQuilken*, 59 Ind. 269.

ELECTIONS.

496.—Action to contest—Contestor not eligible—Illegal votes.

[*Caption and commencement.*]

That defendant admits the holding of the election, as alleged in the complaint; that the parties hereto were candidates for the office of — of said county of —; that there was counted for each of the parties the number of votes alleged in the complaint, and that this contestee was declared elected to said office; and he alleges that the contestor was not eligible to said office, for the reason [*state the facts showing him to be ineligible*], [*or, that of the votes counted for the contestor, — were cast by persons under the age of — years, and — by persons not resident of said county or entitled to vote therein,*

and this contestee received and there were counted for him a majority of the legal votes cast for said office.]

Wherefore, he demands judgment.

[Signature.]

1. Necessary allegations. R. S. 1881, § 4757; *Allen v. Crow*, 48 Ind. 301; *Dobyns v. Weadon*, 50 Ind. 298.

2. Need not be verified. *Allen v. Crow*, 48 Ind. 301.

3. Defective notice of election, effect of. *Parmater v. The State*, 102 Ind. 90.

4. Appointee to office, how long holds. *Parmater v. The State*, 102 Ind. 90.

See COMPLAINT, p. 149.

ESTOPPEL.

497.—Standing by at sale.

[Caption and commencement.]

That defendant purchased the property described in plaintiff's complaint on the — day of —, 18—, from one —, who then had the same in his possession, claiming it to be his own, and sold the same to defendant as his property.

That defendant purchased said property for the sum of — dollars [or state any other valuable consideration], which he has paid in full.

That plaintiff stood by and saw defendant purchase said property from said —, and pay his money therefor, and did not make known his title to or interest therein.

That plaintiff, at the time, well knew his own rights as to said property, and that said — had no title thereto, and purposely concealed the facts from defendant.

That defendant purchased said property and paid for the same, believing that said — was the owner thereof, and was ignorant of plaintiff's claim, all of which plaintiff at the time well knew.

That said — is wholly insolvent, and the money paid by defendant can not be recovered back.

Wherefore, defendant says the plaintiff should be estopped to set up any claim to said property as against him, and he demands judgment.

[Signature.]

1. What will amount to an estoppel. (a.) *Estoppel in pais.* Ante, vol. 1, § 606; *Plummer v. Farmers' Bank*, 90 Ind. 386; *Wire v. Wyman*, 93 Ind. 392; *Anderson v. Hubble*, 93 Ind. 570; *Roach v. White*, 94 Ind. 510; *Mitchell v. Fisher*, 94 Ind. 108; *Pepper v. Zahnsinger*, 94 Ind. 88; *Warey v. Forst*, 102 Ind. 205.

(b.) *By matter of record.* Ante, vol. 1, § 605; *Shumaker v. Johnson*, 35 Ind. 33; *Locke v. White*, 89 Ind. 492; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Randall v. Lower*, 98 Ind. 255; *Levering v. Shockey*, 100 Ind. 558; *Lord v. Wilcox*, 99 Ind. 491.

(c.) *As against married women.* R. S. 1881, § 5117; ante, vol. 1, § 607; *Levering v. Shockey*, 100 Ind. 558; *Wilhite v. Hamrick*, 92 Ind. 594; *Cupp v. Campbell*, 103 Ind. 213.

(d.) *Against infants.* *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Jennings*, 62 Ind. 111; *Kastner v. Pibilinski*, 96 Ind. 229, 231.

(e.) *Against public corporations.* *Union School Tp. v. First National Bank of Crawfordsville*, 102 Ind. 464; *Platter v. Board of Comrs., etc.*, 103 Ind. 360.

(f.) "*Standing by.*" *Wire v. Wyman*, 93 Ind. 392; *Gatling v. Rodman*, 6 Ind. 289; *Catherwood v. Watson*, 65 Ind. 576; *Anderson v. Hubble*, 93 Ind. 570.

2. Knowledge of parties, how affects. Ante, vol. 1, § 606; *Robbins v. Magee*, 76 Ind. 381; *Buck v. Milford*, 90 Ind. 291; *Sims v. The City of Frankfort*, 79 Ind. 446; *Mitchell v. Fisher*, 94 Ind. 108; *Union School Tp. v. First National Bank of Crawfordsville*, 102 Ind. 464.

EXECUTORS AND ADMINISTRATORS.

See COMPLAINTS ON OFFICIAL BONDS, pp. 74-79; ANSWERS IN ABATEMENT, p. 334; ANSWERS in case of PRINCIPAL AND SURETY, p. 391.

EXEMPTION.

See SHERIFFS, p. 293; ANSWER IN ATTACHMENT, p. 344.

FALSE IMPRISONMENT.

498.—Justification.

[*Caption and commencement.*]

That on the — day of —, 18—, one — filed before —, a justice of the peace of — township, — county, Indiana, his affidavit, charging the plaintiff with having on the — day of —, 18— [*state the offense in the language of the affidavit*], said justice having jurisdiction in said cause.

That defendant was then, and at the times alleged in plaintiff's complaint, a constable of said township.

That on said day said justice issued his warrant for the arrest of plaintiff on said charge, a copy of which is filed herewith and made a part of this complaint, and placed the same in the hands of defendant to be executed.

That on the — day of —, 18—, by virtue of said warrant, and not otherwise, defendant arrested plaintiff, and took him forthwith before said justice, where he gave bond and was released, and said arrest and imprisonment was the one charged in the complaint herein.

Wherefore, defendant demands judgment.

[*Signature.*]

[*Copy of warrant.*]

499.—Arrest on view without warrant.

[Caption and commencement.]

That on the — day of —, 18—, defendant was the constable of the township of —, county of — [sheriff of the county of —], [marshal of the city of —], State of Indiana.

That on said day the plaintiff, in the presence and view of defendant, at —, in said county and state [*state the facts showing the commission of the offense as in an affidavit therefor*].

That defendant, as such constable [sheriff], [marshal], while plaintiff was in the act of committing said offense, arrested him therefor, without a warrant, and took him immediately before —, a justice of the peace of said township, and the justice nearest to the place where said offense was committed and arrest made, and caused an affidavit to be forthwith filed against him before said justice, charging him with said offense. And this was the imprisonment charged in plaintiff's complaint.

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations. (a.) *Arrest on warrant.* Hall v. Rogers, 2 Blkf. 429; Wasson v. Canfield, 6 Blkf. 406; Poulk v. Slocum, 3 Blkf. 421; Goodwine v. Stephens, 63 Ind. 112; Cooper v. Adams, 2 Blkf. 294; Jeffries v. McNamara, 49 Ind. 142.

(b.) *Arrest without warrant.* R. S. 1881, § 1702; Gallimore v. Ammerman, 39 Ind. 323; Boaz v. Tait, 43 Ind. 60; Low v. Evans, 16 Ind. 486; Vandever v. Mattocks, 3 Ind. 479; Goodwine v. Stephens, 63 Ind. 112; Wilste v. Holt, 95 Ind. 469; Scircle v. Neeves, 47 Ind. 289.

(c.) *On suspicion that felony has been committed.* Wasson v. Canfield, 6 Blkf. 406.

(d.) *Person acting under officer.* Goodwine v. Stephens, 63 Ind. 112; Dietrichs v. Schaw, 43 Ind. 175.

(e.) *Special constable.* Dietrichs v. Schaw, 43 Ind. 175; Benninghoof v. Finney, 22 Ind. 101.

(f.) *Mittimus.* Jeffries v. McNamara, 49 Ind. 142; Hiday v. Gilmore, 3 Blkf. 48.

2. Justification must be specially pleaded. Colter v. Lower, 35 Ind. 285; Gallimore v. Ammerman, 39 Ind. 323; Boaz v. Tait, 43 Ind. 60; Carey v. Sheets, 60 Ind. 17.

3. Want of jurisdiction of court, effect of. Taylor v. Moffatt, 2 Blkf. 305; Hall v. Rogers, 2 Blkf. 429; Poulk v. Slocum, 3 Blkf. 421; Burt v. Pyle, 89 Ind. 398; Patterson v. Prior, 18 Ind. 440; Griffin v. Wilcox, 21 Ind. 370.

4. Jurisdiction, how and when must be alleged. Poulk v. Slocum, 3 Blkf. 421.

5. Must show imprisonment to be same as alleged in complaint. Gallimore v. Ammerman, 39 Ind. 323; Young v. Warder, 94 Ind. 357.

FORMER ADJUDICATION.**500.—General form.**

[*Caption and commencement.*]

That on the — day of —, 18—, in an action in the — Circuit Court, wherein this plaintiff was plaintiff and this defendant was defendant, for the same cause of action alleged in the complaint herein, said — recovered judgment on the merits thereof for —.

Wherefore, defendant demands judgment.

[*Signature.*]

501.—Partial adjudication.

[*Caption and commencement.*]

The defendant, for answer to the — paragraph of plaintiff's complaint [*or, to so much of plaintiff's complaint as—state the part claimed to have been adjudicated*], alleges:

That on the — day of —, 18—, in an action then pending in the — Circuit Court [*or, before —, a justice of the peace of — township, — county, Indiana*], wherein — was plaintiff and — defendant, the cause of action was the same as set out in said — paragraph of complaint in this action [*or, the same as plaintiff's cause of action herein, so far as—state the part adjudicated*], and said matter being at issue between said parties, judgment was rendered in said cause thereon in favor of — on the merits. [*If before a justice of the peace, say: which judgment was duly given.*]

Wherefore, defendant demands judgment.

[*Signature.*]

502.—Judgment on demurrer.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff herein filed his complaint in the — Circuit Court against this defendant, alleging the same facts stated in the complaint herein.

That on the — day of —, 18—, in said action this defendant filed his demurrer to said complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was, on the — day of —, 18—, sustained.

That plaintiff declined to amend said complaint, and judgment on demurrer was duly rendered in favor of this defendant.

That by said demurrer the merits of this action were put in issue, and the judgment thereon was upon the merits upon the facts pleaded in said action and in this.

Wherefore, defendant demands judgment.

[*Signature.*]

1. What will amount to former adjudication. Ante, vol. 1, § 605; *Felton v. Smith*, 88 Ind. 149; *Elwood v. Beymer*, 100 Ind. 504; *Ulrich v. Drischell*, 88 Ind. 354; *Farrar v. Clark*, 97 Ind. 447; *Cleveland v. Creviston*, 93 Ind. 31; *The State v. Krug*, 94 Ind. 366; *The State v. Board of Comrs., etc.*, 101 Ind. 69; *Hildebrand v. McCrum*, 101 Ind. 61; *Lantz v. Maffett*, 102 Ind. 23; *Strong v. McKeever*, 102 Ind. 578; *Luntz v. Greve*, 102 Ind. 173.

2. Necessary allegations. Ante, vol. 1, § 605; *Rynearson v. Parkhurst*, 88 Ind. 264; *Elwood v. Beymer*, 100 Ind. 504; *The State v. Krug*, 94 Ind. 366; *Hildebrand v. McCrum*, 101 Ind. 61; *Ludlow v. The Marion, etc., Gravel R. Co.*, 101 Ind. 176.

3. Action for part of claim, when bars suit for remainder. *Felton v. Smith*, 88 Ind. 149; *Cleveland v. Creviston*, 93 Ind. 31.

4. Who bound by former judgment. Ante, vol. 1, § 605; *Ulrich v. Drischell*, 88 Ind. 354; *Farrar v. Clark*, 97 Ind. 447; *McCaslin v. The State*, 99 Ind. 428; *Atkinson v. Mott*, 102 Ind. 431.

5. Judgment on demurrer, when a bar. Ante, vol. 1, § 605. See also *The State v. Krug*, 94 Ind. 366.

6. Former decision in same case, on appeal, effect of. Ante, vol. 2, § 1111; *Union School Tp. v. First Nat'l Bk. of Crawfordsville*, 102 Ind. 464.

FRAUD.

503.—False representations.

[*Caption and commencement.*]

That the note sued on was given by defendant in consideration of the sale, by plaintiff to defendant, of a certain horse.

That to induce defendant to purchase said horse and execute said note, plaintiff falsely and fraudulently represented to defendant [*set out the representations, e. g.*] that said horse was sound, and quiet in harness, and was only — years old.

That said representations were false, and known to be so by plaintiff at the time.

That said horse was not sound; but was [*state how diseased*], and would not work in harness, and was — years old.

That defendant was ignorant of the fact, and believed and relied upon said representations, and was thereby induced to purchase said horse and execute the note sued on.

That on the — day of —, 18—, defendant first discovered that said representations were false, and he thereupon [*or, on the — day of —, 18—*] tendered said horse to plaintiff and demanded said note; but plaintiff refused to accept the horse or deliver the note.

That said horse, if he had been as represented by plaintiff, would have been of the value of — dollars; but he was, in fact, of the

value of not exceeding — dollars, and, for defendant's use, was wholly worthless.

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations. Ante, vol. 1, § 628; *Clodfelter v. Hulett*, 72 Ind. 137; *Bethell v. Bethell*, 92 Ind. 318. See ante, vol. 1, § 1057.

2. Return of consideration, when necessary. Ante, vol. 1, § 628; ante, p. 281, note 3.

3. When knowledge of falsity, by plaintiff, material. *Bethell v. Bethell*, 92 Ind. 318.

See DECEIT, p. 144; FRAUDULENT CONVEYANCE, p. 153; INSURANCE, p. 372; JUDGMENTS, p. 185; RESCISSION AND CANCELLATION, pp. 279-282.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT, pp. 344, 525.

GUARANTY.

504.—Want of diligence against principal.

[Caption and commencement.]

That the plaintiff did not, at the maturity of the claim sued on, or at any other time [or, until the — day of —, 18—], notify defendant that — [*principal debtor*] had not paid the same, nor had defendant any knowledge of his default in payment.

That at the time said claim fell due [and for — months thereafter], said — was the owner of a large amount of real and personal property in the county of —, State of Indiana, subject to execution, out of which said debt could have been made; but plaintiff did not sue said — therefor, or take any steps to collect the same from him until the — day of —, 18—.

That in the meantime said — had become, and still is, wholly insolvent, and if defendant is compelled to pay plaintiff's claim, he will lose the same. Whereas, if plaintiff had used proper diligence in notifying defendant of the default of said —, or in collecting from him, defendant would not have been compelled to pay or lose the same.

Wherefore, defendant says that by reason of the negligence and want of diligence of plaintiff, he has been damaged in an amount equal to plaintiff's claim, and he demands judgment. [Signature.]

1. Want of diligence must be pleaded and damage shown. *Smith v. Bainbridge*, 6 Blkf. 12; *Gaff v. Sims*, 45 Ind. 262; *Ward v. Wilson*, 100 Ind. 52; *La Rose v. The Logansport Nat'l Bk.*, 102 Ind. 332; ante, p. 159, Form 212, and notes.

2. Notice of acceptance and default of principal, when necessary. Ante, p. 159, Form 212, note 4; *Ward v. Wilson*, 100 Ind. 52; *La Rose v. The Logansport Nat'l Bk.*, 102 Ind. 332.

See COMPLAINTS—GUARANTY, pp. 156-160; PRINCIPAL AND SURETY, p. 391.

505.—Signing on condition that others should sign as principal.

[*Caption and commencement.*]

That defendant executed the contract of guaranty by indorsing and signing the same on the — mentioned in the complaint.

That said — was then written, the names of A. B., C. D., and E. F. being inserted therein as principals; but the said E. F. had not yet signed the same.

That defendant signed said guaranty at the instance and request of said A. B., and on the express condition and agreement with said A. B. that the same should not be binding on defendant, or delivered to plaintiff until said — was signed by said E. F., as one of the principals.

That said E. F. never signed said instrument; and A. B., in violation of said agreement, and without defendant's knowledge or consent, delivered the same, with said guaranty, to the plaintiff [who accepted and received the same, with full knowledge of the agreement and the condition on which defendant signed said guaranty.]

Wherefore, defendant demands judgment.

[*Signature.*]

1. Necessary allegations. The payee of a written instrument is not bound by a verbal agreement that one of the parties thereto shall not be bound thereby until the same is signed by another person, unless he has notice of the condition, or there is something on the face of the instrument to put him on inquiry. Ante, p. 67, note 12; post, p. 393; *The Markland Mining, etc., Co. v. Kimmel*, 87 Ind. 560.

Therefore, the facts showing such knowledge, or sufficient to put him on inquiry, must be alleged. As to what is sufficient to put the payee on inquiry and release the guarantors, see *The Markland Mining, etc., Co. v. Kimmel*, 87 Ind. 560, and cases cited.

HABEAS CORPUS.

506.—Return to writ—By sheriff.

[*Caption and commencement.*]

The defendant, for return to the writ herein, alleges:

That he is now, and was, at the times stated in the petition, the sheriff of — county, State of Indiana.

That on the — day of —, 18—, the grand jury of said county, duly impaneled, found and returned into the — Circuit Court an indictment against the petitioner, charging him with the crime of [*state the offense*].

That thereafter, on the — day of —, 18—, the clerk of said court issued a warrant of arrest for the petitioner on said indictment, and placed the same in the respondent's hands, as such sheriff, to be executed, a copy of which warrant is filed herewith, and made a part of this return.

That on the — day of —, 18—, this respondent, as such sheriff, arrested the petitioner under said warrant, on said charge, as commanded therein.

That petitioner failed to give bond, and this defendant, as such sheriff, confined him in the jail of said county, and now holds him in custody, under said warrant, and not otherwise.

Or, That on the — day of —, 18—, one — filed his affidavit against the petitioner before —, a justice of the peace of — township, county of —, State of Indiana, charging him with [*state the offense*].

That said cause came on for trial before said justice, on the — day of —, 18—, and the petitioner was, by the judgment of said justice, duly given, convicted of said offense, and fined — dollars; and it was by said justice adjudged that he be confined in the jail of said county until said fine and the costs of said action were paid or replevied.

That petitioner failed to pay or replevy said fine and costs, and said justice, by a mittimus, a copy of which is filed herewith, and made a part of this return, committed the petitioner to the county jail.

That this respondent, as the sheriff of said county, received the petitioner under said mittimus from —, who was then the constable of said township, and now holds him in custody thereunder, and not otherwise.

That said fine and costs have not yet been paid or replevied.

Wherefore, the respondent asks that the petitioner be remanded to his custody.

[Signature.]

[Verification.]

[Copy of warrant or mittimus.]

1. Judgment under which petitioner held conclusive. *Smith v. Hess*, 91 Ind. 424.

507.—By mother of infant on petition by father.

[Caption and commencement.]

That the petitioner and respondent were formerly husband and wife, and the said — named in the petition and writ is their child, the fruits of said marriage.

That on the — day of —, 18—, in an action of this respondent against the petitioner for divorce, in the — Circuit Court, it was adjudged by said court that the respondent be granted a divorce from petitioner, and that she have the care, custody, and control of their children, including said —, until the further order of said court.

That said order granting her the custody of said — is still in force, and no further or different order has been made.

Or, That petitioner and respondent are living apart.

That the said — is of the age of — years, and needs the care and attention of a mother, and the respondent is a suitable and proper person to have the care and custody of said —, and has a good home and is amply able and willing to care for, clothe, and educate him [her].

That the petitioner has no means with which to clothe, care for, and educate said child; has no home, is an habitual drunkard, and is of bad character and wholly unfit to have the care and raising of a young child.

Wherefore, she asks that she be given the custody of said child.

[Verification.]

[Signature.]

1. Necessary allegations. *R. S.* 1881, §§ 1115, 1116; ante, vol. 2, § 1422; *Sturgeon v. Gray*, 96 Ind. 166; *Lucas v. Hawkins*, 102 Ind. 64.

For forms of PETITION, see ante, pp. 161, 162; PRACTICE GENERALLY, vol. 2, §§ 1418–1428.

INFANTS.

508.—Answer of infancy—General form.

[Caption and commencement.]

That the defendant was, at the time of executing the — sued on [and still is], an infant under the age of twenty-one years.

Wherefore, he demands judgment.

[Signature.]

509.—Infancy and return of property.

[*Caption and commencement.*]

That he admits the making of the contract sued on, and that he received from the plaintiff, in consideration thereof, the sum of — dollars [*or, the following property*], [*describe it*].

That defendant was then an infant of the age of — years.

[That within a reasonable time after he arrived of age, to wit, on the — day of —, 18—, he tendered to plaintiff said sum of money (property) received by him, and demanded a rescission of said contract, but the plaintiff refused.]

Wherefore, he demands judgment.

[*Signature.*]

1. Need not allege offer to return consideration. An infant may disaffirm his contract without offering to return the consideration received by him. *Carpenter v. Carpenter*, 45 Ind. 142; *Towell v. Pence*, 47 Ind. 304; *White v. Branch*, 51 Ind. 210; *Dill v. Bowen*, 54 Ind. 204; *Clark v. Van Court*, 100 Ind. 113; *Richardson v. Pate*, 93 Ind. 423.

2. When may disaffirm. *Sims v. Bardoner*, 86 Ind. 87; *Clark v. Van Court*, 100 Ind. 113; *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

3. Infant married woman, when must disaffirm. *Seranton v. Stewart*, 52 Ind. 68; *Sims v. Bardoner*, 86 Ind. 87; *Sims v. Smith*, 86 Ind. 577; *Miles v. Lingerman*, 24 Ind. 385; *Losey v. Bond*, 94 Ind. 67; *Richardson v. Pate*, 93 Ind. 423.

4. Conveyance of real estate can not be disaffirmed during infancy. *Chapman v. Chapman*, 13 Ind. 396; *Welch v. Bunce*, 83 Ind. 382.

5. What amounts to disaffirmance. *Losey v. Bond*, 94 Ind. 67, and cases cited.

6. Disaffirmance, when necessary. *Law v. Long*, 41 Ind. 586.

7. Who may plead infancy. *Price v. Jennings*, 62 Ind. 111; *Shrock v. Crowl*, 83 Ind. 243.

8. When infancy a good defense. *Ayers v. Burns*, 87 Ind. 245, and cases cited.

For further forms affecting infants, see COVERTURE, p. 360; RATIFICATION, p. 412.

INSURANCE.

Fire Insurance.

510.—Transfer without insurer's consent.

[*Caption and commencement.*]

That it is provided in the policy sued on that in case of any transfer or termination of the interest of the insured, either by sale or otherwise, of the property insured, without the consent of the company, the policy should from thenceforth be void.

That after the making of said policy, and before the loss alleged, the interest of the said [insured] in said [insured property] was terminated and transferred, and title thereto vested in said plaintiff without the consent of the defendant, whereby the policy became and was void at the time of said loss.

Wherefore, defendant demands judgment.

[Signature.]

511.—House not occupied.

[Caption and commencement.]

That at the time of making the policy sued on the house insured was occupied, and it is provided in said policy that if at any time during the time of the insurance thereon said house should become vacant and unoccupied, and a loss should occur while the same was unoccupied, the defendant should not be liable for such loss.

That said house became vacant on the — day of —, 18—, and was still unoccupied at the time of the loss alleged in the complaint.

Wherefore, defendant demands judgment.

[Signature.]

1. House unoccupied a good defense. That the house is unoccupied is a good defense if the policy requires it to be occupied. But it is held that the complaint, to be good, must allege that the house is occupied, so that the question may be presented by demurrer to the complaint. Ante, p. 175, note.

512.—Over insurance.

[Caption and commencement.]

That before [after], [at the time of] granting the policy sued on the plaintiff became insured on the same property in another company, to which defendant never consented, nor was such consent indorsed on the policy.

Wherefore, etc.

[Signature.]

513.—False representations—Warranty.

[Caption and commencement.]

That at the time of making the policy sued on plaintiff made his written application therefor, in which he represented [*state what, e. g.*] that the property described in the policy was then insured for — dollars [which application was referred to in said policy, and made part thereof as a warranty on the part of the assured].

That the statements and representations in said application were false, in this: [*state in what the statements in the application were untrue, e. g.*] the statement that said property was then insured for — dol-

lars was false [as plaintiff well knew], the same being insured in the sum of — dollars.

[Or, That in said application of plaintiff for the policy of insurance sued on the question was asked: "Is said property mortgaged or otherwise incumbered?" To which he answered, "No."]

[That said application was duly executed by plaintiff, and referred to and made a part of said policy, as a warranty by plaintiff of the facts therein set out.]

That said answer was false, in this: said property was, at the time of said application and insurance, incumbered by a mortgage given by plaintiff thereon to one —, to secure the sum of — dollars, which mortgage was a valid and subsisting lien.

That said representations were material to the risk, and defendant was ignorant of the facts and relied thereon, and was induced thereby to issue said policy.

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations. If the application is made a part of the policy, and filed with it as a part of the complaint, the facts set out in it need not be stated in the answer. But where the application is not made part of the complaint, the answer must allege what the representations were and that they were false, and in what respect they were untrue. A false representation as to a material fact, whether the same is made a warranty or not, is a good defense. *Commonwealth's Ins. Co. v. Moninger*, 18 Ind. 352; *Cox v. The Aetna Ins. Co.*, 29 Ind. 586; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132.

See FRAUD, ante, p. 367, Form 503, and notes.

514.—Change of use of building.

[Caption and commencement].

That at the time the policy sued on was issued to plaintiff the building thereby insured was used and occupied by him as a [state what].

That thereafter, on the — day of —, 18—, without the knowledge or consent of defendant, he changed the use of said building by converting the same into a [state what], and has ever since used the same as such, whereby the risk of loss by fire was greatly increased.

Wherefore, etc.

[Signature.]

1. How policy affected by change of use. *Behler v. The German Mutual Ins. Co.*, 68 Ind. 347; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578. See also *Phoenix Ins. Co. v. The Union M. L. Ins. Co.*, 101 Ind. 392.

515.—Non-payment of premiums.

[*Caption and commencement.*]

That, in consideration of the issuing of the policy sued on, the plaintiff executed to defendant his three promissory notes for — dollars, each payable in —, —, and — months respectively.

That it is provided in said policy that upon the failure of plaintiff to pay any one of said premium notes said policy should at once become void.

That the second of said notes fell due on the — day of —, 18—, but plaintiff failed to pay the same at maturity, and the same still remains unpaid.

Wherefore, defendant demands judgment.

[*Signature.*]

1. Effect of non-payment of premium. American Ins. Co. v. Henley, 60 Ind. 515.

For further forms, see COMPLAINT, pp. 172-181; REPLY, p. 413.

2. Life Insurance.**516.—Fraud in procuring policy.**

[*Caption and commencement.*]

That before the issuing of the policy sued on, the deceased, —, made to defendant his written application for the issuing thereof, in which certain questions and the answers thereto by plaintiff were set out.

That among other questions and answers were the following: [*set out the questions and answers.*]

That said answers were false [and known by said deceased to be so], in this: [*state particularly in what respect the answers were untrue and what the facts really were.*]

That the facts so misrepresented were material to said risk, defendant was ignorant of the facts and relied upon said representations, and was induced thereby to issue said policy.

Wherefore, defendant demands judgment.

[*Signature.*]

1. When representations will avoid policy. Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; John Hancock Mut. L. Ins. Co. v. Daly, 65 Ind. 6; Northwestern Mut. L. Ins. Co. v. Heimann, 93 Ind. 24.

2. Difference between representation and warranty. Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; Mut. Ben. L. Ins. Co. v. Cannon, 48 Ind. 264; Phoenix Ins. Co. v. Benton, 87 Ind. 132.

3. Necessary allegations. *Mut. Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264.

For further forms, see COMPLAINT, p. 177; REPLY, p. 413.

517.—Failure to pay premium—Forfeiture.

[*Caption and commencement.*]

That it is provided by the policy sued on that the same is given in consideration of the semi-annual premium of — dollars, to be paid before noon on the — day of —, 18—, and —, and that upon a failure to pay any of said semi-annual installments on or before the days mentioned, said policy should cease and determine, and all rights under said policy should be forfeited.

That the installments of said premium falling due on the — day of —, 18—, and the — day of —, 18—, were not paid on or before they fell due [but were still unpaid at the time of the death of the insured].

Wherefore, defendant demands judgment.

[*Signature.*]

1. Effect of failure to pay premium when due. *Ante*, p. 176, note 3; *post*, p. 413; *Willcutts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300; *Northwestern Mut. L. Ins. Co. v. Little*, 56 Ind. 504; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7.

518.—Death caused by unlawful act of insured.

[*Caption and commencement.*]

That it is provided by the policy of insurance sued on that if assured shall die by reason of his known violation of the laws of any of the states or of the United States, the policy should be void.

That said assured came to his death as follows: [*state the facts showing the violation of the law, and that it was the cause of his death.*]

Wherefore, defendant demands judgment.

[*Signature.*]

1. Necessary allegations. *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478.

JUDGMENTS.

519.—Want of jurisdiction of the person—Foreign judgment.

[*Caption and commencement.*]

That defendant was, at the time plaintiff's action named in the complaint was commenced, and at the time said judgment was rendered therein, a non-resident of said State of —, and absent therefrom;

and defendant was never served with summons in said action, or otherwise notified of the pendency thereof, and never appeared therein, either personally or by attorney.

That the plaintiff and one —, who claimed to be acting as deputy sheriff of the county in which said judgment was rendered, conspired together to defraud defendant and to make a false return on the summons issued in said cause; and in pursuance of said conspiracy said — made return on said summons, showing service thereof on defendant, with the fraudulent intent to show by said return that said court had jurisdiction of the person of this defendant; whereas said summons was not served on defendant in any manner, and said return was wholly false and fraudulent as aforesaid.

That said return is the only matter in the record of said cause relating to or tending to show jurisdiction of the person of defendant therein.

Wherefore, defendant demands judgment.

[Signature.]

1. When and how judgment may be collaterally attacked.

Ante, vol. 1, §§ 1038, 1057; *Wescott v. Brown*, 13 Ind. 83; *Cavanaugh v. Smith*, 84 Ind. 380; *Reed v. Whitton*, 78 Ind. 579; *Oppenheim v. Pittsburg, etc., Ry. Co.*, 85 Ind. 471; *Smith v. Hess*, 91 Ind. 424; *Smith v. Clifford*, 99 Ind. 113; *Anderson v. Wilson*, 100 Ind. 402; *Exchange Bank v. Ault*, 102 Ind. 322.

2. Officer's return of service, when conclusive. Ordinarily, the officer's return of service on the defendant is conclusive where the judgment is attacked collaterally. Ante, vol. 1, § 244; vol. 2, § 1186; *Cavanaugh v. Smith*, 84 Ind. 380.

But it is held that the rule does not apply where it is alleged that the return was fraudulently made. *Cavanaugh v. Smith*, 84 Ind. 380; *Brown v. Eaton*, 98 Ind. 591.

3. Necessary allegations. *Exchange Bank v. Ault*, 102 Ind. 322; *Rogers v. Beauchamp*, 102 Ind. 33; *Reid v. Mitchell*, 93 Ind. 469; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486.

4. What is a collateral attack. *Reid v. Mitchell*, 93 Ind. 469; *Rogers v. Beauchamp*, 102 Ind. 33; *Exchange Bank v. Ault*, 102 Ind. 322.

See COMPLAINT—JUDGMENT, p. 185.

520.—Fraud in obtaining judgment.

[Caption and commencement.]

That, after the commencement of the action mentioned in the complaint, plaintiff came to defendant, and with intent to deceive him and prevent him from defending it, falsely and fraudulently represented [set out particularly the fraudulent representations].

That defendant relied upon said representations, and was induced

thereby not to defend said action, and said judgment was taken against him by plaintiff on default.

Wherefore, he demands judgment.

[Signature.]

1. Necessary allegations. Ante, p. 185, Form 248, and authorities cited in the notes.

JURISDICTION.

521.—General form of want of jurisdiction.

[Caption and commencement.]

The defendant, for answer to plaintiff's complaint, alleges:

That the — Circuit Court has not jurisdiction of the subject-matter of the action, but plaintiff's cause of action, if any, arose in the county of —, State of Indiana, and the jurisdiction of this cause is in the — Circuit Court of the state.

Wherefore, defendant demands judgment.

[Signature.]

[Verification.]

1. When question of may be raised by answer. Ante, vol. 1, §§ 474-478.

2. Actions, where commenced. Ante, vol. 1, §§ 179-202.

See COMPLAINT—JUDGMENTS, pp. 182-187; ANSWER—JUDGMENTS, pp. 376-378;

LANDLORD AND TENANT.

522.—Assignment by lessee.

[Caption and commencement.]

That on the — day of —, 18—, and before the rent claimed in plaintiff's complaint fell due, defendant duly assigned all his right, title, and interest in such lease to one —, who thereupon took possession of said premises.

That on the — day of —, 18—, plaintiff was duly notified of said assignment, and thereupon agreed with defendant and said — to accept said — as his tenant of said premises, and to look only to him for the rent thereof.

Wherefore, defendant demands judgment.

[Signature.]

523.—Surrender.

[*Caption and commencement.*]

That on the — day of —, 18—, before the rent claimed in plaintiff's complaint fell due, defendant surrendered to plaintiff the premises described, and the plaintiff accepted the same and took possession thereof.

Wherefore, etc.

[*Signature.*]

524.—Eviction by lessor.

[*Caption and commencement.*]

That on the — day of —, 18— [or, before the rent claimed in plaintiff's complaint fell due], plaintiff entered into said premises and evicted defendant therefrom, and has ever since [or, until said alleged rent fell due] kept him out of the possession of the same.

Wherefore, etc.

[*Signature.*]

525.—Covenant to rebuild—Loss of building by fire.

[*Caption and commencement.*]

That by the lease under which plaintiff claims rent, a copy of which is filed herewith and made part of this answer, plaintiff covenanted that in case of the loss of the building leased, by fire, he would immediately rebuild the same.

That before any part of the rent sued for became due said building was, without any fault on defendant's part, accidentally destroyed by fire, by reason of which defendant has been unable to use or occupy said premises.

That plaintiff has wholly failed to rebuild the same.

Wherefore, defendant demands judgment.

[*Signature.*]

[*Copy of lease.*]

526.—Loss by fire without covenant to rebuild.

[*Caption and commencement.*]

That the premises leased by defendant for which plaintiff claims rent consisted of one room of a large three-story building, occupied by stores below and sleeping rooms and offices on the upper floors, severally, by different tenants.

That on the — day of —, 18—, before the rent claimed, or any part of it, was due, said building, without the fault of defendant, was

wholly destroyed by fire, by reason whereof defendant has since been unable to occupy said premises.

Wherefore, defendant demands judgment.

[Signature.]

1. Who liable for rent on assignment by lessee. The lessee can not relieve himself from liability for the rent by an assignment. The covenant to pay rent follows the land, and the lessor may look to the lands in the hands of the assignee therefor. But he may, at his option, look to the lessee personally, notwithstanding the assignment. *Carley v. Lewis*, 24 Ind. 23. Therefore, an agreement to look to the assignee for the rent must be alleged.

2. Destruction by fire, when a defense. *Womack v. McQuarry*, 28 Ind. 103. See also *Biddle v. Reed*, 33 Ind. 529; *Skillen v. The Water-works Co.*, 49 Ind. 193.

LIBEL AND SLANDER.

527.—Justification—Truth of words—General charge.

[Caption and commencement.]

That he admits the speaking of the words charged in the complaint, but alleges that on the — day of —, 18—, at the county of —, State of —, the plaintiff did unlawfully and feloniously steal, take, and carry away one —, the property of one —, of the value of — dollars; and so he says said words were true.

Wherefore, he demands judgment.

[Signature.]

528.—Same—Charge specific.

[Caption and commencement.]

That he admits the speaking of the words charged in the complaint, but says said words are true.

Wherefore, etc.

[Signature.]

529.—Charge of perjury.

[Caption and commencement.]

That on the — day of —, 18—, at the trial of a certain cause then pending in the — Circuit Court, having jurisdiction of said cause, wherein one — was plaintiff and one — was defendant, plaintiff appeared as a witness on behalf of —, and was duly sworn by —, clerk of said court, then and there having power and authority to administer said oath, and the truth of the matter hereinafter stated to have been testified by plaintiff was material to the issue in said cause, and plaintiff being so sworn, feloniously, maliciously, corruptly, and falsely gave evidence that [state the evidence claimed to

be false]; whereas, in fact, as plaintiff well knew [*here negative the plaintiff's evidence*], and so said words were true.

Wherefore, defendant demands judgment. [Signature.]

530.—Charge of want of chastity.

[Caption and commencement.]

That defendant admits the speaking of the words, but alleges that on the — day of —, 18—, plaintiff had carnal connection with one —, not being her husband, and also on the — day of —, 18—, had carnal connection with a person whose name is to defendant unknown, not her husband; and so the words charged in the complaint are true.

Wherefore, defendant demands judgment. [Signature.]

531.—Privileged communication.

[Caption and commencement.]

That he admits the speaking of the words charged in the complaint, but alleges that plaintiff had been, prior to the times in the complaint stated, in the employ of defendant as [*state capacity*]; and one —, being desirous of employing plaintiff, inquired of defendant as to the character of plaintiff, and defendant then stated to him the matter set forth in the complaint, which is the publication complained of.

That he spoke said words without malice, and had reasonable cause to believe, and did believe, the same to be true. and did not in any other way publish the same.

Wherefore, he demands judgment. [Signature.]

1. Justification, how alleged. Ante, vol. 1, § 632.

See COMPLAINT—LIBEL AND SLANDER, pp. 196–202.

LIMITATIONS.

532.—General form.

[Caption and commencement.]

That plaintiff's cause of action did not accrue within — [*state time necessary to bar in the particular case*] years before the bringing of this action.

Wherefore, defendant demands judgment. [Signature.]

533.—Death of one of the parties—Extension of time.*[Caption and commencement.]*

That the cause of action sued on did not accrue within six years before the death of the deceased, — [or, within seven years and six months before the bringing of this action], [or, within five years before the death of said —, and this action was not commenced within eighteen months after the death of said —].

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations—Death of one of the parties. Ante, vol. 1, § 280; *Knippenberg v. Morris*, 80 Ind. 540; *Epperson v. Hostetter*, 95 Ind. 583; *Wright v. Kegla*, 104 Ind. 223.

2. Defense not barred by time. *Robinson v. Glass*, 94 Ind. 211.

534.—Statute of another state.*[Caption and commencement.]*

That the — sued on was executed and payable in the State of —.

That by a statute of said State of —, then and still in force, a copy of which is filed herewith and made a part of this answer, it was provided that an action on a — should be barred at the end of — years after the cause of action thereon arose.

That defendant was, at the time said — fell due, and for more than — years thereafter, a resident of said State of —, and the plaintiff's action was not commenced within — years after the maturity of said —.

Wherefore, defendant demands judgment.

*[Signature.]**[Copy of statute.]*

1. Necessary allegations. The limitation of the statute of another state can not be pleaded to a cause of action arising in this state. R. S. 1881, § 297; ante, vol. 1, §§ 275, 276, 278; *Mechanics' Building Assn. v. Whitacre*, 92 Ind. 547.

The proviso of section 297, R. S. 1881, limiting its operation to causes of action arising out of the state, is held to apply only to the latter clause of the section relating to statutes of other states. *Mechanics' Building Assn. v. Whitacre*, 92 Ind. 547.

Therefore, the answer must show that the cause of action arose out of the state, and that it is barred by the statute of the state where the defendant resides, or did reside, for the required time. See on this subject, generally, *Van Dorn v. Bodley*, 38 Ind. 402; *Harris v. Harris*, 38 Ind. 423; *Wright v. Johnson*, 42 Ind. 29.

MALICIOUS PROSECUTION.

1. **What may be proved under general denial.** Ante, vol. 1, §§ 579, 580; *Trodden v. Deckard*, 45 Ind. 572.

See COMPLAINT, p. 211.

MANDAMUS.**535.—Return—General form.**

[*Caption and commencement.*]

The defendant, for return to the alternative writ herein, alleges:

1. That he denies each and every allegation thereof and of the affidavit therefor.

2. [*Allege any special matters in avoidance.*]

Wherefore, the defendant demands judgment. [Signature.]

1. **Return, how pleaded, and necessary allegations.** Ante, vol. 2, § 1450; *The State v. The Burnsville, etc., Tp. Co.*, 97 Ind. 416; *State v. Morrison*, 103 Ind. 161.

2. **Practice generally.** Ante, vol. 2, §§ 1446-1450.

See COMPLAINT, pp. 218-220.

MASTER AND SERVANT.**536.—Discharge of servant—Incompetency.**

[*Caption and commencement.*]

That at the time defendant employed plaintiff as a —, as alleged in the complaint, plaintiff represented to defendant that he was reasonably competent, and had sufficient skill and ability as such — to perform the services for which he was employed by defendant.

That defendant relied upon said representations, and was induced thereby to employ plaintiff.

That plaintiff was not reasonably competent or able to perform said services, but was wholly incompetent and unable to perform the same; wherefore, and for no other reason, he was discharged by defendant.

Wherefore, defendant demands judgment. [Signature.]

537.—Misconduct of plaintiff.

[*Caption and commencement.*]

That after the making of the contract sued on, and before the alleged dismissal, the plaintiff willfully misconducted himself by [*state the acts of misconduct*].

Wherefore, and for no other reason, defendant discharged the plaintiff, and this is the breach complained of

Wherefore, defendant demands judgment.

[Signature.]

See COMPLAINT—MASTER AND SERVANT, p. 221; NEGLIGENCE, pp. 244, 247; ANSWER—INFANTS, p. 371.

MECHANICS' LIENS.

538.—General form—Several defenses by purchaser of property.

[Caption and commencement.]

The defendant, —, for separate answer to plaintiff's complaint, alleges:

1. That he denies each and every allegation thereof.
2. That before the bringing of this action one —, the contractor for the construction of the building mentioned in the complaint, who contracted for the material of plaintiff, fully paid plaintiff therefor before the bringing of this action.

3. That after said material was furnished, and before plaintiff's notice of lien was filed, defendant purchased said property from the defendant, —, for a valuable consideration, which he paid in full.

That before purchasing said property defendant applied to plaintiff, and stated to him that he was about to buy the same, and requested to know whether he had or would make any claim against the same by way of a mechanics' lien or otherwise, and plaintiff stated to defendant that the materials furnished by him for said building had been fully paid for by —, the contractor; that he had no claim on said property, and would make none.

That defendant was ignorant of the facts, and believed and relied upon said representations, and was induced thereby to purchase said property and pay cash therefor.

That said —, from whom defendant purchased said property, is insolvent, and if defendant is compelled to pay plaintiff's claim he will lose the same.

4. That this defendant, prior to the filing of plaintiff's notice of lien, and without any notice or knowledge of his claim, purchased said property from the defendant, —, for the sum of — dollars, which he then paid.

That the material furnished by plaintiff was furnished on a special contract, made therefor by defendant, —, and not otherwise.

That said defendant was, at the time he contracted for said material, an infant under the age of twenty-one years.

That said materials were not necessities.

That said — has disaffirmed said contract for said material by pleading his infancy in this action.

That this defendant received a deed from said — for said property, and on the — day of —, 18—, the same was duly recorded in the recorder's office of said county of —.

Wherefore, defendant demands judgment. [Signature.]

1. Defense of infancy—Necessary allegations. Price v. Jennings, 62 Ind. 111.

2. Giving promissory note payable in bank is payment. Hill v. Sloan, 59 Ind. 181; Schneider v. Kolthoff, 59 Ind. 568.

See COMPLAINT, pp. 203–206.

MISTAKE.

See COMPLAINT, pp. 228, 276; COUNTERCLAIM, p. 407; ante, vol. 1, § 593; Mason v. Mason, 102 Ind. 38.

MORTGAGES.

539.—To secure several notes—Former foreclosure on note last due.

[Caption and commencement.]

That the mortgage sued on was given by —, the mortgagor, to plaintiff, to secure the payment of — promissory notes of even date therewith for — dollars, each payable in —, —, and — years from date respectively.

That the note sued on herein is the one falling due first of said several notes.

That on the — day of —, 18—, plaintiff, then being the owner and holder of all of said notes, brought his action in this court to recover on the one of said notes which fell due last, and to foreclose the mortgage sued on in this action, and on the — day of —, 18—, recovered judgment in said action on said note for — dollars and a decree foreclosing said mortgage for the satisfaction thereof.

That on the — day of —, 18—, this defendant purchased the real estate described in said mortgage from said —, and paid him therefor the sum of — dollars in cash, and assumed and agreed to

pay plaintiff's said judgment, which he did pay on the — day of —, 18—, amounting to the sum of — dollars.

That at the time defendant purchased said property he had no notice or knowledge that the note sued on herein was unpaid, but believed the same had been paid.

Wherefore, defendant demands judgment.

[*Signature.*]

1. Necessary allegations. *Minor v. Hill*, 58 Ind. 176.

540.—Married woman—Mortgage given to secure debt of another.

[*Caption and commencement.*]

That this defendant is now and was at the time the note and mortgage sued on were given the owner in fee-simple of the real estate described in said mortgage as her own separate property [having derived title thereto by devise (gift) (descent) from one —, her father].

That she was, at the time said note and mortgage were executed, and still is, a married woman, the wife of her co-defendant.

That the note sued on was given for the debt of her said husband, and she signed the same as his surety, and not otherwise, and received no part of the consideration therefor, and executed said mortgage solely to secure his said debt.

Wherefore, she demands judgment.

[*Signature.*]

1. Necessary allegations. *Frazer v. Clifford*, 94 Ind. 482; *Levering v. Shockey*, 100 Ind. 558; ante, p. 360; and notes; *Cupp v. Campbell*, 103 Ind. 213.

For further forms affecting mortgages, see COMPLAINT, pp. 227-232; COVENANTS, p. 358; COVERTURE, p. 360; DURESS, p. 362; CONSIDERATION, p. 354; FRAUD, p. 367; INFANCY, p. 371; RATIFICATION, p. 412; MECHANICS' LIENS, p. 384; PAYMENT, p. 390; PRINCIPAL AND SURETY, p. 391.

NOVATION.

541.—General form.

[*Caption and commencement.*]

That defendant admits the execution of the note sued on to the plaintiff, but alleges that on the — day of —, 18—, one — being indebted to defendant, it was agreed between plaintiff, said —, and defendant, that said — should execute to plaintiff his note for the amount due from defendant to plaintiff on the note sued on, in consideration that plaintiff would accept the same in lieu of defend-

ant's note, and defendant would release said — from further liability to him for said sum.

That, in pursuance of said agreement, said — executed to plaintiff, and plaintiff accepted, his note for said amount, and defendant released and receipted to said — for that sum on his indebtedness, but plaintiff has never delivered up defendant's note.

Wherefore, defendant asks that said note be declared satisfied, and that he have judgment for costs. [Signature.]

1. Necessary allegations—What amounts to novation. Grover v. Sims, 5 Blkf. 498; Millard v. Porter, 18 Ind. 503; Morris v. Whitmore, 27 Ind. 418; Henry v. Ritenour, 31 Ind. 136; Porter v. Dearing, 33 Ind. 155; Hoffa v. Hoffman, 33 Ind. 172; Helms v. Kearns, 40 Ind. 124; Nichols v. Glover, 41 Ind. 24; Jewett v. Pleak, 43 Ind. 368; Tyner v. Stoops, 11 Ind. 22; Stevens v. Anderson, 30 Ind. 391; Glasgow v. Hobbs, 32 Ind. 440; Clark v. Billings, 59 Ind. 508; Bristol Milling, etc., Co. v. Probasco, 64 Ind. 406.

See ACCORD AND SATISFACTION, p. 339; PAYMENT, p. 390.

OFFICERS.

See OFFICIAL BONDS, pp. 74–101; SHERIFFS, pp. 290–297; FALSE IMPRISONMENT, p. 152, 364; HABEAS CORPUS, p. 161, 370; QUO WARRANTO, p. 268; ELECTION, p. 149, 362; ATTACHMENT AND GARNISHMENT, p. 344; MANDAMUS, p. 218; PRINCIPAL AND SURETY, p. 391; OFFICE AND OFFICER, p. 257.

PARTITION.

542.—Advancements.

[Caption and commencement.]

The defendants, for answer to plaintiff's complaint, allege:

That on the — day of —, 18—, at —, one —, the father of the parties to this action, died intestate, the owner in fee-simple and in possession of the real estate described in the complaint, leaving the parties hereto his only heirs at law.

That he owned no other property at the time of his death.

That on the — day of —, 18—, said — conveyed to the plaintiff the following real estate in the county of —, State of —, as an advancement to plaintiff and in full of his interest in his estate, and plaintiff accepted the same as such advancement in full of his interest of any and all property that might be owned by said — at his death.

[Or, if not in full of his interest, say: That the real estate (or other

property, if so) so conveyed to plaintiff was of the value of — dollars, which sum should be deducted from his distributive interest in the whole estate.]

Wherefore, they ask judgment [that said sum of — dollars be taken into account in arriving at the interest of the parties in said real estate, and that the same be partitioned accordingly].

[Signature.]

1. What will constitute an advancement. *Stanley v. Brannon*, 6 Blkf. 193; *Hodgson v. Macy*, 8 Ind. 121; *Shaw v. Kent*, 11 Ind. 80; *Clendenning v. Clymer*, 17 Ind. 155; *Dillman v. Cox*, 23 Ind. 440; *Barnes v. Allen*, 25 Ind. 222; *Woolery v. Woolery*, 29 Ind. 249; *Duling v. Johnson*, 32 Ind. 155; *Denman v. McMahan*, 37 Ind. 241; *Harness v. Harness*, 49 Ind. 384; *Stokesberry v. Reynolds*, 57 Ind. 425; *Dille v. Webb*, 61 Ind. 85.

2. Alleging title under will, the will not foundation of defense. *Black v. Richards*, 95 Ind. 184.

3. Defense of title must be good as to all who plead it. *Black v. Richards*, 95 Ind. 184.

PARTNERSHIP.

543.—Non est factum by one partner.

[Caption.]

The defendant, —, for separate answer to plaintiff's complaint, alleges:

1. That he did not execute the note sued on, and the same is not his note.

Wherefore, he demands judgment.

[Signature.]

1. Effect of non est factum by one partner. One of the defendants in an action on a joint contract may deny its execution by him. *Pursley v. Morrison*, 7 Ind. 356; *Lucas v. Baldwin*, 97 Ind. 471; ante, p. 338.

If one partner denies the execution of the note, and it is signed in the name of the firm, the burden rests upon the plaintiff to prove not only the signing by the other partner, but that such partner had authority to bind the firm by its execution. *Graves v. Kellenberger*, 51 Ind. 66; *Lucas v. Baldwin*, 97 Ind. 471.

But it is sufficient if it is shown to have been signed by one of the firm within the scope of the partnership business, although it is signed in the individual names of the partners, and not the partnership name. *Maiden v. Webster*, 30 Ind. 317.

2. What may be proved under non est factum by one partner. *King v. Barbour*, 70 Ind. 35.

3. Note executed after dissolution—Failure to give notice. A debt contracted after dissolution by one of the partners, in the regular course of business, may be binding on the partner as between him and the creditor,

although as between the partners the agency has ceased to exist. To avoid this it is incumbent upon members to give notice of the dissolution, personally, to regular customers, and generally by publication to all the world. *Uhl v. Harvey*, 78 Ind. 26; *Iddings v. Pierson*, 100 Ind. 418.

PATENT RIGHT.

544.—Fraud in sale of patent right.

[*Caption and commencement.*]

That the ——— sued on herein was given in consideration of the sale and conveyance of the right to use and sell in the counties of ———, State of ———, a ———, for which the plaintiff represented to defendant that letters patent had been issued to him.

That to induce defendant to purchase said right to sell said ———, and to execute said note therefor, plaintiff falsely represented to defendant that [*state the representations particularly*].

That said representations were false, in this: [*state in what they were false.*]

That defendant was ignorant of the facts, and believed and relied upon said representations, and was induced thereby to purchase the right to use and sell said ——— and execute said note.

That defendant first discovered the fraudulent character of said representations on the ——— day of ———, 18—.

That immediately thereafter [*or, on the ——— day of ———, 18—*] he notified plaintiff that he would not be bound by said contract, and tendered to plaintiff a reconveyance of said right.

That defendant did not sell any of said ———, or realize any money therefrom, and the same was wholly worthless.

[*Or, if the false representation is that the invention is a new and useful one, say:* That said ——— was not a new and useful invention, and was wholly worthless.

That defendant was ignorant of the facts, and believed and relied upon said representations, and was induced thereby to make said purchase and execute said note.]

Wherefore, defendant demands judgment.

[*Signature.*]

1. Necessary allegations. *Kernodle v. Hunt*, 4 Blkf. 57; *McClure v. Jeffrey*, 8 Ind. 79; *Johnson v. McCabe*, 37 Ind. 535; *Hunter v. McLaughlin*, 43 Ind. 38; *Louden v. Birt*, 4 Ind. 566; *Morrow v. Brown*, 31 Ind. 378; *Detrick v. McGlone*, 46 Ind. 291.

2. Want of title a good defense. *Hardesty v. Smith*, 3 Ind. 39.

3. Not a new invention. *Morrow v. Brown*, 31 Ind. 378; *McClure v. Jeffrey*, 8 Ind. 79; *Johnson v. McCabe*, 37 Ind. 535.

4. When conveyance back must be tendered. The rule is that if the thing purchased is worthless it need not be tendered back. But if it is not alleged to be worthless a tender is necessary. Therefore the answer must allege either that the thing purchased is of no value or that within a reasonable time after discovering the fraud a reconveyance was tendered. *Johnson v. McLane*, 7 Blkf. 501; *Hardesty v. Smith*, 3 Ind. 39; *Hess v. Young*, 59 Ind. 379; *Crow v. Eichinger*, 34 Ind. 65.

5. Testing patent, when must be done and how. See ante, p. 314, Form 416, and notes.

6. Failure to file copies of letters patent, etc. The statute requires that the vendor of a patent right shall file an authenticated copy of the letters patent with the clerk and make affidavit that they have not been revoked or annulled, and that he has authority to sell the same. R. S. 1881, § 6054.

It has been held that the failure of a corporation, selling under a patent from the United States, to comply with the general statute relating to foreign corporations, did not affect its right to sue, on the ground that, as applied to such sales, the statute is unconstitutional. *The Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454. See also *Helm v. First National Bank, etc.*, 43 Ind. 167.

But the first of these cases is expressly overruled, and the statute above cited is held to be valid as a police regulation. *Brechbill v. Randall*, 102 Ind. 528.

Other obligations are imposed by this statute which were held to be unconstitutional. *Helm v. First National Bank, etc.*, 43 Ind. 167.

But the Supreme Court of the United States has held such restrictions to be valid. *Patterson v. Kentucky*, 97 U. S. 501.

And this case has been followed by later cases in Indiana. *Toledo Agri. Works v. Work*, 70 Ind. 253; *Brechbill v. Randall*, 102 Ind. 528. See also *Fry v. The State*, 63 Ind. 552.

6. Warranty. As the transfer of a patent right can only be made by deed, it is held that a parol warranty can not be shown. *Johnson v. McCabe*, 37 Ind. 535; ante, p. 315, note 5.

For further forms, see CONSIDERATION, pp. 354-357; WARRANTY, ante, pp. 314-317; post, p. 401; ANSWER IN ABATEMENT, p. 335, Form 452, and note.

PAYMENT.

545.—General form.

[Caption.]

The defendant, for answer to plaintiff's complaint, alleges:

1. That he fully paid the — [plaintiff's claim], sued on before the bringing of this action.

Wherefore, defendant demands judgment.

[Signature.]

546.—Payment after suit brought.

[Caption.]

The defendant, for answer against the further maintenance of this action, alleges:

That on the — day of —, 18—, defendant paid to plaintiff and plaintiff accepted the amount of the claim sued for in this action.

Wherefore, defendant demands judgment against the further maintenance of this action. [Signature.]

547.—Payment to former holder.

[Caption and commencement.]

That the note sued on herein was given to one —.

That on the — day of —, 18—, and before notice, by defendant, that the same had been assigned to plaintiff, defendant paid the amount then due thereon to said —.

Wherefore, defendant demands judgment. [Signature.]

1. Payment, how alleged. Ante, vol. 1, §§ 594–597.

2. Payment after suit brought. Ante, vol. 1, § 596; *Herod v. Snyder*, 61 Ind. 453.

3. Payment of less than is due. Ante, vol. 1, § 597; vol. 3, p. 339; Form 458, and notes; *Laboyteaux v. Swigart*, 103 Ind. 598.

4. Payment to former holder—Necessary allegations. Ante, vol. 1, § 595.

5. Payment by commercial paper. Ante, vol. 1, § 597; vol. 3, p. 339, Form 458, and note; *Lindeman v. Rosenfield*, 67 Ind. 246.

PRINCIPAL AND SURETY.**548.—Extension of time of payment to principal.**

[Caption and commencement.]

That this defendant executed the — sued on as the surety of the defendant, —, and received no consideration therefor, which was known to plaintiff at the time the same was executed.

That said note fell due on the — day of —, 18—, but prior thereto the plaintiff, without the knowledge of this defendant, in consideration of [*state the consideration for the extension, e. g.*] the payment by defendant, —, of — per cent additional interest thereafter, agreed to and did extend the time of the payment of said — for — months.

Wherefore, this defendant demands judgment. [Signature.]

1. Necessary allegations. Ante, vol. 1, § 609; *Buck v. Smiley*, 64 Ind. 431; *Lindeman v. Rosenfield*, 67 Ind. 246; *Cartmel v. Newton*, 79 Ind. 1; *Gipson v. Ogden*, 100 Ind. 20.

2. Must be upon a consideration. To constitute the extension a defense it must have been given upon such a consideration as would prevent the holder bringing an action against the principal. *Brown v. Harness*, 16 Ind. 248; *Menifee v. Clark*, 35 Ind. 304; *Chrisman v. Tuttle*, 59 Ind. 155; *Buck v. Smiley*, 64 Ind. 431; *Cartmel v. Newton*, 79 Ind. 1; *Sterne v. The Bank of Vincennes*, 79 Ind. 549; *Gipson v. Ogden*, 100 Ind. 20.

3. Must be for a definite time. On the same principle, viz., that the contract must be such as to prevent the bringing of an action, it is held that the extension must be for a definite time. *Menifee v. Clark*, 35 Ind. 304; *Bucklen v. Huff*, 53 Ind. 474; *Starrett v. Burkhalter*, 70 Ind. 285; *Gipson v. Ogden*, 100 Ind. 20.

4. That payee knew of suretyship must be shown. Ante, vol. 1, § 609.

549.—Failure to sue principal when notified.

[Caption and commencement.]

That this defendant executed the note sued on, as the surety of [the defendant] —, and received no part of the consideration therefor, as plaintiff well knew at the time the same was executed.

That on the — day of —, 18—, said note then being due, this defendant notified plaintiff, in writing, forthwith to institute an action thereon.

That plaintiff did not forthwith, or within a reasonable time, institute an action on said note, but failed and neglected to sue thereon [until the — day of —, 18—, when this action was commenced].

Wherefore, defendant says he is released from liability on said note, and demands judgment.

[Signature.]

1. How notice to sue must be given. R. S. 1881, § 1210; ante, vol. 1, § 608; *Franklin v. Franklin*, 71 Ind. 573; *Chrisman v. Tuttle*, 59 Ind. 155.

2. Holder must sue within reasonable time. Ante, vol. 1, § 608.

3. Excuse for failure to sue, what sufficient. Ante, vol. 1, § 608.

4. Necessary allegations. Ante, vol. 1, § 608; *Daily v. Robinson*, 86 Ind. 382.

5. Death of principal—Notice to sue—Necessary allegations. *Whittlesey v. Heberer*, 48 Ind. 260; *Franklin v. Franklin*, 71 Ind. 573; *Daily v. Robinson*, 86 Ind. 382; *Marshall v. Mathers*, 103 Ind. 458.

6. Effect of notice by one of several sureties. *Cochran v. Orr*, 94 Ind. 433.

As to diligence in case of commercial paper, see ante, pp. 60–62, and notes.

550.—Signing on condition.

[Caption and commencement.]

That this defendant executed the note as the surety of the defendant, —, and received no part of the consideration therefor, as the plaintiff well knew at the time the same was executed.

That at the time said note was given this defendant was indebted to one —, in the sum of — dollars, as the surety of the defendant, —, which was then due.

That it was agreed between this defendant, the defendant, —, and plaintiff, that in consideration of the execution of the note sued on herein, and of this defendant's becoming surety for said — thereon, the plaintiff was to loan to said — the sum of — dollars, which sum it was then agreed was to be applied to the payment of said note to —, on which this defendant was surety, thereby releasing defendant from further liability thereon, and defendant executed the note sued on in consideration and on the condition that the money to be loaned thereon should be applied on said note to —, as plaintiff at the time well knew.

That after defendant had so executed said note, the plaintiff [with the knowledge and consent of defendant, —], and without the knowledge and consent of this defendant, applied the money loaned thereon to the payment of a note of said defendant to plaintiff, upon which he had no security, and the said note to — remains unpaid [or, this defendant has since been compelled to pay said note of —'s].

Wherefore, this defendant demands judgment. [Signature.]

1. Necessary allegations. *Armstrong v. Cook*, 30 Ind. 22; *Heeg v. Weigand*, 33 Ind. 289; *Johnson v. May*, 76 Ind. 293; *The State v. Pepper*, 31 Ind. 76.

2. Effect of failure to comply with condition—Official bonds. *Pepper v. The State*, 22 Ind. 399; *Deardorf v. Foresman*, 24 Ind. 481; *The State v. Garton*, 32 Ind. 1; *State v. Blair*, 32 Ind. 313; *Hunt v. The State*, 53 Ind. 321; *Allen v. Marney*, 65 Ind. 398; *Hunter v. Fitzmaurice*, 102 Ind. 449.

3. Notice of condition by payee must be shown. *State v. Pepper*, 31 Ind. 76; *Webb v. Baird*, 27 Ind. 368; *State v. Blair*, 32 Ind. 313.

But if there is sufficient on the face of the instrument to put the payee or obligee on inquiry, as, for example, where the name of one of the principals appearing in the body of the instrument is not signed thereto, this is sufficient notice to authorize the defense that the instrument was signed by the surety on condition that such principal should sign. *Ante*, p. 369; *Wildcat Branch v. Ball*, 45 Ind. 213; *Allen v. Marney*, 65 Ind. 398; *The Markland Mining, etc., Co. v. Kimmel*, 87 Ind. 560.

As to the effect of a special contract between one surety and the principal

as to his liability and his relation to other sureties, see *Baldwin v. Fleming*, 90 Ind. 177.

Same as between the sureties, see *Mires v. Alley*, 51 Ind. 507.

4. Surety signing at request of another surety, effect of. *Ba-gott v. Mullen*, 32 Ind. 332; *Bobbitt v. Shryer*, 70 Ind. 513.

551.—Release of property of principal by creditor.

[*Caption and commencement.*]

That this defendant executed the note sued on as the surety of the defendant, —, and received no part of the consideration therefor, as the plaintiff well knew at the time the same was executed.

That, as additional security for the payment of said note, said defendant executed to plaintiff a mortgage on [*state what*], [*or, delivered to plaintiff as collateral security (state what)*].

That on the — day of —, 18—, without the knowledge or consent of this defendant, plaintiff released said mortgage [*or, delivered to defendant, —, said property held as collateral security*].

That said property has since been disposed of by defendant, —, and can not be reached by execution, and said defendant is wholly insolvent.

That said property was of the value of — dollars, and plaintiff could have realized therefrom the full amount of the note sued on.

Wherefore, this defendant demands judgment. [Signature.]

1. Release of property, when and to what extent releases surety. *Ante*, vol. 1, § 611; *Stewart v. McMahan*, 94 Ind. 389; *Clodfelter v. Hulett*, 72 Ind. 137; *Sterne v. The Bank of Vincennes*, 79 Ind. 549; *Crim v. Fleming*, 101 Ind. 154; *Holland v. Johnson*, 51 Ind. 346.

2. Necessary allegations. *Ante*, vol. 1, § 611; *Holland v. Johnson*, 51 Ind. 346.

3. Release of property from lien of execution. *Sterne v. The Bank of Vincennes*, 79 Ind. 549; *Sterne v. McKinney*, 79 Ind. 578.

For further forms affecting sureties, see **PROMISSORY NOTES**, pp. 50–65; **BILLS, NOTES, AND CHECKS**, p. 348; **CONSIDERATION**, p. 354; **COVERTURE** p. 360; **INFANTS**, p. 371; **RELEASE**, p. 396.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. No answer necessary or proper. R. S. 1881, § 822; *ante*, vol. 2, § 253.

For further forms under this subject, see **EXECUTIONS**, p. 586–590.

QUIETING TITLE.

1. All defenses may be proved under general denial. R. S. 1881, §§ 1055, 1070, 1071; *Graham v. Graham*, 55 Ind. 23.

QUO WARRANTO.

552.—Statute of limitations.

[*Caption and commencement.*]

That the defendants, on the — day of —, 18—, in good faith, attempted to organize a corporation as the —, with the defendants as members thereof, and elected directors, and have from that time until the bringing of this action continuously done business and acted, in the county of —, as a corporation, by said name of —, with the knowledge and without objection on the part of the relators in this action.

Wherefore, they demand judgment.

[*Signature.*]

1. Time, when a bar to the action. *State v. Bailey*, 19 Ind. 452; *Albert v. The State*, 65 Ind. 413; *The State v. Gordon*, 87 Ind. 171. See also *White v. The State*, 69 Ind. 273; ante, p. 270.

RAILROADS.

553.—Killing animals—Agreement of plaintiff to maintain fence.

[*Caption and commencement.*]

That the defendant admits that the — named in the complaint were killed by defendant's cars, and that said — entered upon the track of defendant's railroad at the place alleged, but defendant alleges that the place where said — entered upon defendant's track was on the lands of plaintiff, where the same adjoins defendant's right of way, and that by an agreement made between plaintiff and defendant, on the — day of —, 18—, the plaintiff, in consideration of — dollars paid him by defendant, promised and agreed to build and maintain a good and sufficient fence along the line of defendant's right of way where the same passed through plaintiff's lands.

That said — entered upon defendant's track at a point on plaintiff's land where he was bound by said agreement to maintain said fence.

That plaintiff failed and neglected to maintain a fence at said point, but negligently allowed the same to become out of repair, by reason of which, and without any negligence on defendant's part, said — entered upon defendant's said track at said place, and were killed.

Wherefore, defendant demands judgment.

[Signature.]

1. Necessary allegations—When plaintiff must maintain fence. President, etc., v. Smith, 16 Ind. 102; Indianapolis, etc., R. R. Co. v. Shimer, 17 Ind. 295; Indianapolis, etc., R. R. Co. v. Adkins, 23 Ind. 340; Indianapolis, etc., R. R. Co. v. Petty, 25 Ind. 413; Louisville, etc., Ry. Co. v. Skelton, 94 Ind. 222; Fort Wayne, etc., R. R. Co. v. Mussetter, 48 Ind. 286; Bond v. Evansville, etc., R. R. Co., 100 Ind. 301.

2. Defendant must show it was not bound to fence. That the road was not fenced at the point where the animals entered must be alleged in the complaint. That it was not the duty of the defendant to fence at such point is matter of defense. Ante, p. 27; Jeffersonville, etc., R. R. Co. v. Lyon, 72 Ind. 107; Jeffersonville, etc., R. R. Co. v. O'Connor, 37 Ind. 95; Indianapolis, etc., R. R. Co. v. Lindley, 75 Ind. 426; Terre Haute, etc., R. R. Co. v. Penn, 90 Ind. 284; Louisville, etc., R. R. Co. v. Hall, 93 Ind. 245.

For further forms affecting railroads, see ANIMALS, pp. 26–28; CORPORATIONS, p. 134; NEGLIGENCE, p. 250; RAILROADS, p. 270.

RELEASE.

554.—General form.

[*Caption and commencement.*]

That on the — day of —, 18—, the plaintiff, in consideration of — [*state the consideration*], then paid by defendant, released and discharged defendant from the claim set forth in the complaint.

Wherefore, he demands judgment.

[Signature.]

555.—Of a joint debtor.

[*Caption and commencement.*]

That the defendant executed the — sued on jointly with one —, who was jointly liable with defendant thereon.

That on the — day of —, 18— [*or, before the bringing of this action*], plaintiff, in consideration of — dollars [*or, for a valuable consideration, the amount of which is unknown to defendant*], then paid by said —, released and discharged said — from further liability thereon.

Wherefore, defendant demands judgment.

[Signature.]

556.—Of joint trespasser.

[Caption and commencement.]

That the trespass set forth in the complaint was committed by defendant jointly with one —.

That on the — day of —, 18—, it was agreed, by and between plaintiff and said —, that — should pay plaintiff, and plaintiff should receive, — dollars in satisfaction and discharge of his liability for said trespass and of all damages sustained by reason thereof, and of all costs then incurred in this action, and said — paid, and plaintiff received, said sum in full satisfaction and discharge of said trespass, damages, and costs.

Wherefore, defendant demands judgment.

[Signature.]

1. Release must be upon consideration. Carter v. Zenblin, 68 Ind. 436; Harris v. Boone, 69 Ind. 300; Fitzgerald v. Smith, 1 Ind. 310; Cincinnati, etc., R. R. Co. v. Pearce, 28 Ind. 502.

2. Release of joint debtor. Kirby v. Cannon, 9 Ind. 371; Coy v. Stucker, 31 Ind. 161; Aylesworth v. Brown, 31 Ind. 270; Starry v. Johnson, 32 Ind. 438; Maxwell v. Day, 45 Ind. 509; Stockton v. Stockton, 40 Ind. 225; Whitworth v. Sour, 57 Ind. 107.

3. Of one who may avoid contract on account of disability. Kirby v. Cannon, 9 Ind. 371; Britton v. Wheeler, 8 Blkf. 31.

4. Taking judgment against one joint debtor. Ante, vol. 1, §§ 443-447; Lawrence v. Sample, 97 Ind. 53; Barnett v. Juday, 38 Ind. 86; Maghee v. Collins, 27 Ind. 83; Hagarty v. Juday, 58 Ind. 154.

5. Release of joint trespasser. Allen v. Wheatley, 3 Blkf. 332.

6. What will amount to a valid release. Reed v. Shaw, 1 Blkf. 245; Berry v. Bates, 2 Blkf. 118; Mendenhall v. Lenwell, 5 Blkf. 125; Lowe v. Blair, 6 Blkf. 282; Harris v. Muskingum Mfg. Co., 4 Blkf. 267; Harvey v. Harvey, 3 Ind. 473; Thalman v. Barbour, 5 Ind. 178; Maxwell v. Day, 45 Ind. 509; Holland v. Johnson, 51 Ind. 346; Wray v. Chandler, 64 Ind. 146; Thomas v. Wilson, 6 Blkf. 203; Mattock v. Lee, 9 Ind. 298.

7. Mortgage may be released by parol. Manzey v. Bowen, 8 Ind. 193; Knarr v. Conaway, 42 Ind. 260; Holland v. Johnson, 51 Ind. 346.

For further forms, see PRINCIPAL AND SURETY, p. 391.

REPLEVIN.

1. What may be proved under general denial. A special answer is rarely, if ever, necessary in actions of replevin. It is held that title in the defendant, or in another, may be proved under the general denial. Ante, vol. 1, § 579; vol. 2, § 1504; Sparks v. Heritage, 45 Ind. 66; Kenedy v. Shaw, 88 Ind. 474.

The same rule must apply to the question of the plaintiff's right to possession,

as the burden is upon him to show that the defendant's possession is wrongful. *Baldwin v. Burrows*, 95 Ind. 81. But the defendant may, if he sees proper, plead the facts specially without a denial.

As to the necessary allegations of an answer in confession and avoidance, see *Smith v. Little*, 67 Ind. 548; *Baldwin v. Burrows*, 95 Ind. 81.

REPLEVIN BAIL.

See PRINCIPAL AND SURETY, pp. 265, 391; SUBROGATION, p. 306; ante, vol. 1, § 1040 et seq.; REPLEVIN BAIL, p. 637.

SALES AND CONTRACTS TO DELIVER.

See CONSIDERATION, p. 354; DURESS, p. 362; FRAUD, p. 367; INFANTS, p. 371; WARRANTY, p. 401.

SHERIFFS.

See OFFICIAL BONDS, pp. 84-88; SHERIFFS, p. 220 et seq.; FALSE IMPRISONMENT, p. 364; HABEAS CORPUS, pp. 161, 370.

TENDER.

557.—Tender of money.

[*Caption and commencement.*]

That on the — day of —, 18— [or, before the bringing of this action], defendant tendered to plaintiff — dollars in [*state the kind of money, which must be a legal tender*], being the amount then due him on the claim sued on herein, but plaintiff refused to receive the same.

That defendant now brings said money into court for the use of the plaintiff.

Wherefore, he demands judgment.

[*Signature.*]

558.—Tender of property.

[*Caption and commencement.*]

The defendant admits the making of the contract set out in the complaint, but alleges that on the — day of —, 18— [*time of delivery fixed by contract*], at [*place of delivery*], he tendered to plaintiff [*describe the property, showing it to be such as is called for by the contract*], but plaintiff refused to receive the same.

That plaintiff has ever since been, and now is, ready to deliver to plaintiff said —.

Wherefore, he demands judgment. [Signature.]

1. Necessary allegations. Ante, vol. 1, §§ 613, 614; *Soice v. Huff*, 102 Ind. 422; *Mathis v. Thomas*, 101 Ind. 119.

2. Effect of tender. Ante, vol. 1, §§ 614, 615.

3. What money is a legal tender. Ante, vol. 1, § 613; *Boyd v. Olney*, 82 Ind. 294; *Michigan Mut. L. Ins. Co. v. Kroh*, 102 Ind. 515.

4. Excuse for failure to make strict tender. *Mathis v. Thomas*, 101 Ind. 119; *Vinton v. Baldwin*, 95 Ind. 433.

5. Tender after suit brought. Ante, vol. 1, § 615.

UNSOUNDNESS OF MIND.

559.—General form—Disaffirmance.

[Caption and commencement.]

That at the time defendant executed the — sued on he was of unsound mind [as plaintiff then well knew].

That the — sued on was given in consideration of — [state the consideration].

That defendant was restored to his reason on or about the — day of —, 18—, and immediately thereafter [or, on the — day of —, 18—] notified plaintiff that he would not be bound by said —, for the reason that he was of unsound mind when he executed the same, and then tendered to plaintiff [show a tender that would put parties in *statu quo*], and demanded said —, but plaintiff refused to accept said — or deliver said — to defendant.

Wherefore, defendant demands judgment. [Signature.]

560.—By guardian—Judicial declaration of incapacity.

[Caption.]

The defendant, —, guardian of the defendant, —, for answer to plaintiff's complaint, alleges:

That at the time the — sued on was executed by said —, he was of unsound mind, and had, on the — day of —, 18—, in an action of — against said —, in the — Circuit Court, been so declared by the judgment of said court, and this defendant was then, by said court, duly appointed his guardian and duly qualified, and has since been, and is now, acting as such

Wherefore, he demands judgment. [Signature.]

1. Necessary allegations. If the defendant has not been judicially declared to be of unsound mind, and the contract is executed, it must appear that the plaintiff, when he contracted with him, had notice of his incapacity, or that the contract was disaffirmed and the plaintiff placed in *statu quo*.

If the defendant had been judicially declared to be of unsound mind, his contract is absolutely void, and of course no disaffirmance or tender of the consideration received by him is necessary. *Wilder v. Weakley's Estate*, 34 Ind. 181; *Musselman v. Cravens*, 47 Ind. 1; *Nichol v. Thomas*, 53 Ind. 42; *Freed v. Brown*, 55 Ind. 310; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433; *Copenrath v. Kienby*, 83 Ind. 18; *Redden v. Baker*, 86 Ind. 191; *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535.

But it is held that an action may be maintained to set aside a deed of real estate, on the ground that the grantor was of unsound mind, without first restoring the consideration to the grantee, but not before disaffirmance. *Nichol v. Thomas*, 53 Ind. 42. But see *Fay v. Burditt*, 81 Ind. 433; *Fulwider v. Ingels*, 87 Ind. 414.

So it is held to be sufficient if the parties can, by the action of the court, be placed in *statu quo*. *Fulwider v. Ingels*, 87 Ind. 414.

As to the necessity of alleging a disaffirmance, see *Schuff v. Ransom*, 79 Ind. 458.

2. What will amount to a disaffirmance. *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68.

3. How long disability continues after office found. *Redden v. Baker*, 86 Ind. 191.

4. Not affected by failure to appoint or discharge guardian. *Redden v. Baker*, 86 Ind. 191.

See **REPLY**, p. 412.

USURY.

561.—General form.

[*Caption.*]

The defendant, for answer to [*state the amount claimed to be usurious interest*], alleges:

That the note in suit was executed to plaintiff for the sum of — dollars, borrowed by defendant from him, and the sum of — dollars was, by agreement of the parties, included in said note for additional interest on the sum borrowed for one year, it being — per cent interest thereon in addition to the interest of — per cent provided for in said note.

Wherefore, the defendant asks judgment as to said sum of — dollars and the interest thereon.

[*Signature.*]

562.—Where note sued on was wholly for usurious interest.

[*Caption and commencement.*]

That at the time the note sued on was executed defendant borrowed from plaintiff — dollars, for which he agreed to pay him — per cent interest.

That he executed to plaintiff his note for said sum of — dollars and interest thereon at — per cent per annum.

That the note sued on was given for the — per cent additional interest agreed to be paid on said loan, and for no other consideration.

Wherefore, defendant demands judgment. [Signature.]

1. Necessary allegations. Ante, vol. 1, § 617.

2. Who may make defense of. Ante, vol. 1, § 618.

See CONSIDERATION, pp. 354–357; RECOUPMENT, p. 408.

WAIVER.

See REPLY, p. 413.

WARRANTY.

563.—General form.

[*Caption and commencement.*]

That the defendant admits the execution of the — sued on, but says the same was given in consideration of the sale and delivery by plaintiff to defendant of [*state what*].

That plaintiff warranted said — to [*set out the warranty particularly*].

That said — was not [*negative the warranty*], but was [*state in what respect the article purchased failed to comply with the warranty*].

Wherefore, plaintiff demands judgment. [Signature.]

564.—On sale of patent right.

[*Caption and commencement.*]

That the — sued on was given in consideration of a deed of conveyance, a copy of which is filed herewith and made a part of this complaint, of the right to use, sell, and transfer a —, for which plaintiff claimed to hold letters patent from the United States.

That, by the terms of said deed, said — was warranted to [*set out the warranty, as in the deed*].

That said — was not [*negative the warranty*], [and was wholly worthless].

[*If a test of the article warranted is necessary to show its falsity, allege particularly the facts showing such test, and that upon being so tested it did not comply with such warranty.*]

Wherefore, defendant demands judgment.

[*Signature.*]

1. Necessary allegations. Ante, p. 315, note; pp. 389, 390; *McClamrock v. Flint*, 101 Ind. 278.

SET-OFF

565.—General form.

[*Caption.*]

The defendant, by way of set-off against plaintiff's cause of action, alleges :

That the plaintiff is indebted to defendant in the sum of —— dollars for [*state what*], a bill of particulars of which is filed herewith and made a part hereof, which sum is now due and unpaid.

Wherefore, the defendant asks that said indebtedness may be set off against plaintiff's claim, and that as to any amount found due over and above plaintiff's claim that he have judgment therefor.

[*Copy of bill of particulars.*]

[*Signature.*]

566.—Principal and surety—Set-off in favor of principal.

[*Caption.*]

The defendants, by way of set-off against plaintiff's claim, allege :

That the defendant, ——, executed the —— sued on as principal, and the other defendants executed the same as his sureties, and received no part of the consideration therefor.

That the plaintiff is indebted to said —— [principal debtor] in the sum of —— dollars, on a promissory note given by plaintiff to him on the —— day of ——, 18—, for —— dollars and —— per cent interest, bearing date ——, 18—, a copy of which note is filed herewith and made a part hereof.

That said note is now due and unpaid.

Wherefore, defendants ask that said indebtedness be set off against any sum that may be found to be due the plaintiff, and that they have judgment.

[*Signature.*]

[*Copy of note.*]

567.—By surety alone.

[Caption.]

The defendant, —, by way of set-off against plaintiff's claim, alleges :

That he admits the execution of the note sued on, but says that he signed the same as the surety of [the defendant] —, and received no part of the consideration therefor.

That the plaintiff is indebted to said — [principal] in the sum of — dollars for work and labor performed by said —, for plaintiff, from the — day of —, 18—, to the — day of —, 18—, at — dollars per month, which sum is now due and unpaid.

Wherefore, he asks that said amount be set off against any sum that may be found to be due plaintiff on the note sued on, and that this defendant have judgment. [Signature.]

568.—Against assignee of commercial paper.

[Caption and commencement as above.]

That he admits the execution of the note sued on and the indorsement thereof to plaintiff, but says that the same was indorsed to plaintiff after its maturity, and at the time of said indorsement said — [payee and indorser] was indebted to defendant in the sum of — dollars for goods and merchandise, a bill of particulars of which is filed herewith and made a part hereof, of which plaintiff had notice at the time he received the same.

That said sum of — dollars is still due and unpaid.

Wherefore, defendant asks that said indebtedness may be set off against the amount found to be due plaintiff.

[Bill of particulars.]

[Signature.]

1. In what cases set-off allowed. Ante, vol. 1, §§ 639-663; Cosgrove v. Cosby, 86 Ind. 511; Wulschner v. Sells, 87 Ind. 71; Avery v. Dougherty, 102 Ind. 443; Gerard v. Dill, 96 Ind. 476; Talmage v. Bierhause, 103 Ind. 270.

2. In favor of principal—Necessary allegations. R. S. 1881, § 349; ante, vol. 1, §§ 639, 647; Lynn v. Crim, 96 Ind. 89.

3. Against assignee—Commercial paper—Necessary allegations. Ante, vol. 1, §§ 649, 650.

4. Assignment, notice of, when prevents set-off of after-acquired claim. Johnson v. Amana Lodge, etc., 92 Ind. 150.

5. Is a cross action and not a defense. Ante, vol. 1, § 640; Wills v. Browning, 96 Ind. 149.

6. Not barred by statute of limitations. Ante, vol. 1, § 652; vol. 3, p. 382; Warring v. Hill, 89 Ind. 497; Robinson v. Glass, 94 Ind. 211.

7. By remote assignor against assignee—Notice. *Huston v. First National Bank*, 85 Ind. 21.

8. By and against decedents' estates. *Dayhuff v. Dayhuff*, 27 Ind. 158; *Harte v. Honchin*, 50 Ind. 327; *Webbon v. Coon*, 57 Ind. 270; *Convery v. Langdon*, 66 Ind. 311; *Carter v. Compton*, 79 Ind. 37.

569.—Of one judgment against another.

[*Caption and commencement.*]

That the defendant admits his indebtedness on the judgment mentioned in the complaint, but says that on the — day of —, 18—, in an action pending in this court [the — Circuit Court of this state], wherein this defendant was plaintiff and plaintiff was defendant [said action being on a promissory note], this defendant recovered a judgment against plaintiff for — dollars.

That said judgment is due and unpaid.

Wherefore, defendant asks that his said judgment be set off against that of the plaintiff [and that he have judgment for any balance over and above the amount found to be due on plaintiff's judgment].

[*Signature.*]

1. Necessary allegations. The right to have one judgment set off against another is equitable and not statutory. *Ante*, vol. 1, § 662; *Puett v. Beard*, 86 Ind. 172.

The relief may be had by motion or by a pleading in regular form. *Puett v. Beard*, 86 Ind. 172.

2. For tort may be set off against one on contract. *Puett v. Beard*, 86 Ind. 172.

3. Mutuality, when not necessary. *Carter v. Compton*, 79 Ind. 37; *Cosgrove v. Cosby*, 86 Ind. 511; *Gillette v. Hill*, 102 Ind. 531.

4. Right to exemption, when may prevent set-off. *Ante*, vol. 1, § 662; *Puett v. Beard*, 86 Ind. 172.

5. Can not defeat lien of attorney for fees. *Ante*, vol. 1, § 662; *Puett v. Beard*, 86 Ind. 172.

6. By or against decedents' estates. *Dayhuff v. Dayhuff*, 27 Ind. 158; *Carter v. Compton*, 79 Ind. 37.

COUNTER-CLAIM--CROSS-COMPLAINT.

NOTE.—But few forms of counter-claims or cross-complaints are given. If the pleader will remember the rule that a counter-claim or cross-complaint is the same as a complaint, must be tested by the same rules as to its sufficiency, and must contain the same allegations as if pleaded as an original cause of action, he can turn to forms of complaint and find what he needs, except as to the commencement, and sometimes the prayer for relief.

The most important question relating to this subject is as to the matters which may be pleaded as a counter-claim or cross-complaint. This question is thoroughly considered in vol. 1, §§ 664-682.

SECTION CV.

COUNTER-CLAIM.

570.—To set aside sale of land for taxes—Counter-claim of taxes paid by purchaser on void sale.

[Caption.]

The defendant, by way of counter-claim against plaintiff, alleges :

That he admits the sale of the real estate described in the complaint, for taxes, and his purchase thereof, as charged ; but says that said real estate was duly assessed for taxation for the year —, and there was due thereon for taxes the sum of — dollars [said real estate being at the time, and ever since, the property of plaintiff].

That the sale thereof alleged in the complaint was made to satisfy said taxes, which were then due, delinquent, and a valid lien thereon.

That defendant purchased said real estate, and paid therefor the sum of — dollars, being the amount of said taxes, interest, and costs, which sum was applied to the payment thereof.

That he has paid the taxes assessed against said property since he purchased the same, amounting to — dollars.

That no part of said amounts have been repaid to defendant, but the same is now due and unpaid.

Wherefore, defendant prays the court that he have judgment against plaintiff for said sums, amounting to — dollars, and the interest thereon allowed by law; that the same be declared a lien on said real estate, and that the same or enough for that purpose be sold to satisfy said sum, and for all other proper relief. [Signature.]

1. When taxes may be recovered as a counter-claim—Necessary allegations. Ante, pp. 309, 310; R. S. 1881, § 6497; *Crecelius v. Mann*, 84 Ind. 147; *Peckham v. Milliken*, 99 Ind. 352.

571.—Breach of contract.

[Caption and commencement.]

That he admits the execution of the contract set out in plaintiff's complaint, which is referred to and made part of this counter-claim.

That this defendant fully complied with all the conditions of said contract on his part to be performed.

That plaintiff failed to comply with said contract, in this: [*state the breaches complained of.*]

Whereby defendant was damaged in the sum of — dollars, for which he demands judgment. [Signature.]

572.—To correct mistake in contract sued on by plaintiff.

[Caption and commencement.]

That plaintiff and defendant entered into a contract on the — day of —, 18—, by which it was agreed [*state the agreement fully*].

That they procured one — to put said contract in writing, who drew the instrument sued on and made part of plaintiff's complaint, which is referred to and made part of this counter-claim.

That, by the mutual mistake of the parties and of said scrivener, there was, and is, a mistake in said writing, in this: [*set out fully the mistake*], and plaintiff and defendant executed the same in ignorance of said mistake, and believing that the same contained the contract as made by them.

That defendant has fully complied with said contract as actually made by the parties.

That plaintiff has failed to comply with the same, in this: [*state the breaches.*]

That defendant first discovered said mistake on the — day of —, 18—, when he applied to plaintiff and demanded a correction thereof, but plaintiff refused.

[That defendant has been damaged, by the failure of plaintiff to comply with said contract, in the sum of — dollars.]

Wherefore, defendant prays the court that said contract be so reformed and corrected as to contain the contract made by the parties [and that he have judgment against the plaintiff for damages for the breach thereof], and for all other proper relief. [Signature.]

1. How far correction of mistake an answer, and to what extent a counter-claim. Whether the correction of a mistake can, in any case, amount to a defense or not, is a disputed question. The weight of authority in this state seems to be that, as the correction of the mistake amounts to affirmative relief, it is a counter-claim, although the mere correction of the instrument sued on is sufficient to defeat the plaintiff's action. *Ante*, vol. 1, § 593; *Mason v. Mason*, 102 Ind. 38.

See MORTGAGES, p. 228; REFORMATION, p. 276.

573.—Usurious interest—Recoupment.

[*Caption and commencement.*]

That the defendant admits the execution of the note sued on, but alleges that the same was given in consideration of a loan to defendant by plaintiff of the sum of — dollars, for which defendant agreed in said note to pay — per cent interest per annum.

That he has paid said rate of interest on said note annually since the same was executed, — dollars of the amount so paid being for usurious interest.

Wherefore, he asks that said sum of — dollars may be recouped against any amount that may be found due the plaintiff.

[Signature.]

1. When usurious interest may be recouped. R. S. 1881, § 5201; *ante*, vol. 1, § 617; *Sager v. Schnewind*, 83 Ind. 204; *Kepler v. Conkling*, 89 Ind. 392.

2. Necessary allegations in recoupment generally. *Ante*, vol. 1, §§ 617, 666.

3. Recoupment is a counter-claim. *Ante*, vol. 1, § 666; *Standley v. North-western, etc., Ins. Co.*, 95 Ind. 254.

For the practice generally in case of counter-claim, and when such a pleading may properly be interposed, see *ante*, vol. 1, §§ 664–681; *Standley v. North-western, etc., Ins. Co.*, 95 Ind. 254; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496; *McCormack Harvesting, etc., Co. v. Gray*, 100 Ind. 285; *Catterlin v. Armstrong*, 101 Ind. 258; *Luntz v. Greve*, 102 Ind. 173.

SECTION CVI.

CROSS-COMPLAINT.

574.—Of suretyship.

[Caption.]

—, who is made a defendant in the above cause, for cross-complaint against the plaintiff and his co-defendants, — and —, alleges :

That he executed the note sued on in this action as the surety of —, and received no part of the consideration therefor.

Wherefore, he prays the court that execution may be first levied upon the property of said — before resorting to the property of this plaintiff. [Signature.]

1. Cross-complaint is commencement of a new action. Ante, vol. 1, §§ 208, 682; *The State v. Ennis*, 74 Ind. 17; *Anderson v. Wilson*, 100 Ind. 402.

2. Cross-complaint generally, nature of, and necessary allegations. Ante, vol. 1, § 682; *Gardner v. Fisher*, 87 Ind. 369; *Anderson v. Wilson*, 100 Ind. 402; *Leaman v. Sample*, 91 Ind. 236.

See COUNTER-CLAIM, p. 406.

575.—Cross-complaint for divorce.

[Caption.]

The defendant, for cross-complaint against the plaintiff, alleges :

[That she is now, and has been for — years last past, a *bona fide* resident of the State of Indiana, and for more than six months last past has been a *bona fide* resident of the county of —.]

That she and the plaintiff were duly married on the — day of —, 18—, and lived together as husband and wife until the — day of —, 18—.

That on the — day of —, 18—, at —, plaintiff wholly abandoned her, without cause, and has lived apart from her since that time against her wish and without her consent, and they have not since cohabited together.

[Or state any other cause for divorce, as on p. 145.]

Wherefore, she asks that the bonds of matrimony existing between her and plaintiff be dissolved, and that she be granted a divorce.

[*Signature.*]

1. Affidavit and allegation of residence not necessary. Ante, vol. 2, § 1388.

2. When divorce will be granted on cross-complaint. R. S. 1881, § 1060; *Glasscock v. Glasscock*, 94 Ind. 163.

REPLY.

576.—Limitations—Exceptions—Disability.

[*Caption.*]

The plaintiff, for reply to the — paragraph of defendant's answer, alleges:

That plaintiff was, at the time the cause of action alleged in the complaint accrued, an infant under the age of twenty-one years [of unsound mind], and continued to be so until within less than two years before the bringing of this action.

Wherefore, plaintiff asks judgment, as prayed for in his complaint.

[*Signature.*]

1. **Effect of legal disability on statute of limitations.** Ante, vol. 1, § 271 et seq.; *Knippenberg v. Morris*, 80 Ind. 540.

See LIMITATIONS, p. 381.

577.—Concealment of cause of action.

[*Caption and commencement.*]

That the defendant concealed the cause of action alleged in the complaint from the plaintiff by [*state the acts or representations constituting the concealment particularly*].

That but for said concealment plaintiff would have had knowledge of said cause of action at the time the same accrued, but by reason thereof he did not discover the same until within less than — years before the bringing of this action.

Wherefore, plaintiff demands judgment.

[*Signature.*]

1. **What amounts to concealment of the cause of action.** Ante, vol. 1, §§ 284, 285.

578.—New promise—Acknowledgment.

[*Caption and commencement.*]

That on the — day of —, 18— [or, within — years before the bringing of this action], the defendant, by his writing, as follows: [*set it out*], [or, a copy of which is filed herewith and made a part of this reply], acknowledged his liability on the — sued on, and agreed to pay the same.

Wherefore, plaintiff demands judgment.

[*Signature.*]

1. What will amount to sufficient new promise. Ante, vol. 1, §§ 286–290.

579.—Ratification of voidable contract.

[*Caption and commencement.*]

That the defendant, after he had arrived at the age of twenty-one years [or, recovered from his intoxication], [or, been restored to soundness of mind], to wit, on the — day of —, 18—, with a full knowledge of the terms and conditions of the contract sued on, ratified and confirmed the same by [*state the acts relied upon as a ratification*].

Wherefore, plaintiff demands judgment as prayed for in his complaint.

[*Signature.*]

1. What will amount to a ratification. Carter v. Pomeroy, 30 Ind. 438; Haggerty v. Juday, 58 Ind. 154; Fouch v. Wilson, 59 Ind. 93; Schee v. McQuilken, 59 Ind. 269; Howe Machine Co. v. Simler, 59 Ind. 307; Catlett v. The Trustees of the M. E. Church, 62 Ind. 365; Parker v. Pitts, 73 Ind. 597.

2. Necessary allegations. Carter v. Pomeroy, 30 Ind. 438; Voiles v. Beard, 58 Ind. 510; Copenrath v. Kienby, 83 Ind. 18.

580.—Unsoundness of mind—Want of knowledge of plaintiff—Bona fide contract.

[*Caption and commencement.*]

That the — sued on was executed by defendant in consideration of — [*state consideration*], then paid [delivered] to defendant.

That when he executed the same he was apparently of sound mind, and there was nothing in his appearance or conduct to indicate that he was of unsound mind.

That plaintiff entered into said contract without any knowledge of his mental incapacity, and believed him to be of sound mind.

That said contract was *bona fide*, and the consideration therefor received by defendant was fair and adequate.

That defendant has not, nor has any one for him, repaid [or, re-

returned] said money [*or name other consideration*], or tendered the same or any part of it, but he still retains the same, and has not offered to rescind said contract.

Wherefore, plaintiff demands judgment, as prayed for in his complaint. [Signature.]

1. Necessary allegations. Ante, p. 399, 400; ; Fay v. Burditt, 81 Ind. 433; Copenrath v. Kienby, 83 Ind. 18; North-western, etc., Ins. Co. v. Blankenship, 94 Ind. 535.

581.—Waiver—Insurance—Failure to pay premium when due.

[*Caption and commencement.*]

The plaintiff admits the failure to pay the installment of premium falling due on the — day of —, 18—, at its maturity, but alleges [*state the facts relied upon as a waiver, e. g.*] that on the — day of —, 18—, plaintiff paid, and the defendant, knowing all the facts, accepted payment thereof without objecting to the time of its payment, and all subsequent installments have been paid by plaintiff and accepted by defendant as they fell due.

Wherefore, plaintiff demands judgment, as prayed for in his complaint. [Signature.]

1. What will amount to a waiver. Ante, p. 176, note 3; Behler v. German Mut., etc., Ins. Co., 68 Ind. 347; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; United Life, etc., Ins. Co. v. The Pres., etc., of Ins. Co. of North Am., 42 Ind. 588; Willcuts v. North-western Mut. L. Ins. Co., 81 Ind. 300; Excelsior Mut. Aid Ass'n v. Riddle, 91 Ind. 84; American Ins. Co. v. Henley, 60 Ind. 515; Masonic, etc., Ass'n v. Beck, 77 Ind. 203.

2. Who may waive payment of premium. Ante, p. 176, note 3; Home Ins. Co. v. Duke, 84 Ind. 253; Franklin L. Ins. Co. v. Lefton, 53 Ind. 380; Aetna Ins. Co. v. Shryer, 85 Ind. 362.

3. Waiver of conditions in contracts generally. Behler v. German Mut. L. Ins. Co., 68 Ind. 347, and cases cited; Charlestown School Tp. v. Hay, 74 Ind. 127; ante, vol. 1, §§ 394, 395; vol. 3, p. 176, note 3.

See COMPLAINT, pp. 172–181; ANSWER, pp. 372–376.

582.—Infancy—That goods furnished were necessities.

[*Caption and commencement.*]

That plaintiff admits the infancy of defendant, as alleged, but says that the goods sold were [*state what*]; that defendant was then — years of age, and was earning his own living and doing business

for himself, and said —— were necessities and proper and suitable to his station in life, and were kept and used by him.

Wherefore, plaintiff demands judgment.

[*Signature.*]

See COMPLAINT—INFANCY, p. 166; ANSWER—INFANTS, p. 371; RATIFICATION, p. 412.

For the rules of pleading applicable to the REPLY, see vol. 1, §§ 683-693.

EVIDENCE.

SECTION CVII.

SUBPŒNA—ATTACHMENT.

583.—Præcipe for subpœna.

State of Indiana, — County,
— Circuit Court, — Term, 18—.

A. B. }
v. } Præcipe.
C. D. }

The clerk will issue a subpœna in the above entitled cause for —, —, and —, to appear and testify in behalf of —.

—, Attorney for —.

584.—For subpœna duces tecum.

[*Caption.*]

The clerk will issue a subpœna in the above entitled cause for — to bring with him [*describe the document wanted particularly*], to be used in evidence, and to testify on behalf of the —. [*Signature.*]

585.—Subpœna—General form.

State of Indiana, — County.

The State of Indiana to the Sheriff of — County:

You are hereby commanded to subpœna — to be and appear before the judge of the — Circuit Court [*or*, Superior Court of — County] on the — day of —, 18—, at the court-house in the city of —, in said county, there to testify as a witness on behalf of the — in an action pending in said court, in which — is plaintiff and — is defendant, and not depart without leave of the court.

Witness, the clerk of said court, at —, this — day of —, 18—. —, Clerk.

586.—Subpœna duces tecum.

State of Indiana, — County.

The State of Indiana to the Sheriff of — County:

You are hereby commanded to subpœna — to be and appear before the judge of the — Circuit Court [*or*, Superior Court of — County] on the — day of —, 18—, at the court-house in the city of —, in said county, there to testify as a witness for the — in an action pending in said court, in which — is plaintiff and — is defendant, and to bring with him, to be used in evidence on the trial of said cause, the following [*describe the papers wanted*], and not depart without leave of the court.

Witness, the clerk of said court at —, this — day of —, 18—. —, Clerk.

1. What subpœna should contain. R. S. 1881, §§ 484, 487. The statute provides that the subpœna shall include the names of all witnesses required at the same time. R. S. 1881, § 487.

But this does not mean that all of the witnesses to be used by a party must be included in one subpœna. He may, after issuing one subpœna, discover other witnesses or see the necessity of making additional proof. Louisville, etc., Ry. Co. v. Dryden, 39 Ind. 393.

2. Party may be subpœnaed Smith v. Rosenham, 19 Ind. 256; ante, vol. 1, § 452.

3. Failure of party to attend, how punished. R. S. 1881, §§ 509–513; ante, vol. 1, § 452; Chaffin v. Brownfield, 88 Ind. 305.

4. More than three witnesses to prove same fact—Cost, how taxed. R. S. 1881, § 488; Louisville, etc., Ry. Co. v. Dryden, 39 Ind. 393.

587.—Subpœna of witness to give deposition.

State of Indiana, — County.

The State of Indiana to the Sheriff of — County [*or*, any Constable of — Township, — County].

You are commanded to subpœna — to appear before me at — [*state the place, as in the notice to take the deposition*], at — o'clock, on the — day of —, 18—, then and there to give his deposition in favor of the — in an action pending in the — Court of the County of —, State of —, wherein — is plaintiff and — is defendant, and have you then and there this writ.

Witness my hand, this — day of —, 18—.

—, Notary Public

[Justice of the — Township, — County, Indiana].

1. How attendance enforced. R. S. 1881, §§ 426, 427; Schroeder's McDonald, p. 98.

588.—Proof of service—Sheriff's return.

Served the within subpoena on the within named —, by reading the same to him, and within his hearing, in the county of —, on the — day of —, 18— [*if on a non-resident of the county, say: and paid (tendered) him — dollars, his fees and mileage*], and on the within named —, by leaving a true copy of this subpoena, duly certified, at his last and usual place of residence, in the county of —, on the — day of —, 18—.

The within named — not found.

—, Sheriff of — County.

589.—Proof of service—Affidavit.

State of Indiana, — County.

—, being duly sworn, says: I served the within subpoena on the within named — by [*state the manner of service, as in the preceding form*], in the county of —, on the — day of —, 18—.

[*Signature.*]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

1. Who may serve subpoena. R. S. 1881, § 484.
2. How service proved. R. S. 1881, § 484.
3. When witness fees must be tendered. R. S. 1881, §§ 489, 490, 492.
4. Who entitled to fees for service. R. S. 1881, § 484.

590.—Affidavit for attachment of witness.

[*Caption.*]

A. B., being duly sworn, says that he is the — [attorney for the —] in the above entitled cause, and that he believes, and has reasonable cause to believe, that the witness, —, for whom a subpoena has been issued herein and served by copy, had knowledge of the service thereof in time to obey the same and be in attendance here at the present time.

[*Jurat.*]

[*Signature.*]

1. When affidavit necessary. R. S. 1881, § 486.

591.—Attachment for witness.

State of Indiana, — County.

The State of Indiana to the Sheriff of — County:

You are hereby commanded to attach the body of —, and have him instanter before the judge of the — Circuit Court, at the courthouse in the city of —, to answer for a contempt of said court in disobeying the process thereof, and have you then and there this writ.

—, Clerk — Circuit Court.

592.—Return of sheriff on attachment.

By virtue of the within writ, I have arrested —, named therein, and now have him in court.

[Or, The within named — is not found in my bailiwick.]

—, Sheriff — County.

SECTION CVIII.

DEPOSITIONS.

593.—Notice to take depositions.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Notice to take Depositions.
C. D. }

The — in the above entitled cause is hereby notified that at — [state the place of taking with particularity, e. g.] the law office of —, No. — street, in the city of —, county of —, State of —, between the hours of — o'clock A. M. and — o'clock P. M. of the — day of —, 18—, the — will, before some officer authorized to take depositions, proceed to take the depositions of — and —, to be read in evidence on the trial of the above entitled cause; and the taking of said depositions will be adjourned and continued from day to day until completed.

—, Attorney for —.

I hereby acknowledge service of the above notice, and waive the issuing of a commission and the authentication of the official character of the officer taking the same, this — day of —, 18—.

—, Attorney for —.

1. **What notice must contain.** R. S. 1881, § 419; ante, vol. 2, § 1235.
2. **How notice served, and on whom.** R. S. 1881, §§ 419, 421; ante, vol. 2, §§ 1235, 1237.
3. **Length of notice.** R. S. 1881, § 420; ante, vol. 2, § 1236; *Fitzpatrick v. Papa*, 89 Ind. 17.
4. **When commission to officer necessary.** R. S. 1881, § 433; ante, vol. 2, § 1238.

594.—Skeleton form of deposition.

Depositions of witnesses taken before me, a —, within and for —, in an action pending in the — Circuit Court [*state the court in which the action is pending, as stated in the notice*], wherein — is plaintiff and — is defendant, for said —, on the — day of —, 18—. [*If more than one day is taken up, give the date as from the — day of —, 18—, to the — day of —, 18—.*]

Said plaintiff was present by his attorney, —. The defendant was not present, either in person or by attorney [*or state the facts as to the parties present*].

—, of the county of —, of lawful age, being first duly sworn [*or, affirmed*] by me, as hereinafter certified, deposed as follows:

DIRECT EXAMINATION BY PLAINTIFF.

1. *Question.* —.
Answer. —.
2. *Ques.* [etc.]

CROSS-EXAMINATION BY DEFENDANT.

1. *Ques.* —.
Ans. [etc.]

RE-EXAMINATION BY PLAINTIFF.

1. *Ques.* —.
Ans. [etc.]

[*Signature of witness.*]

Also —, of lawful age, being duly sworn [*or, affirmed*], as hereinafter certified, deposed as follows: [*Proceed as above.*]

The further taking of these depositions is continued until nine o'clock A. M. of the — day of —, 18—.

—, Notary Public.

This — day of —, 18—, at nine o'clock A. M., the taking of these depositions is resumed, pursuant to adjournment.

—, Notary Public.

The said — further deposes:

- *Ques.* —.
Ans. [etc.]

[*Signature of witness.*]

1. **Manner of taking depositions and practice generally.** Ante, vol. 2, §§ 1234-1249.

2. **Depositions in criminal cases.** R. S. 1881, § 1805; *Butler v. The State*, 97 Ind. 378.

595.—Certificate of officer.

State of —, County of —.

I, —, a —, in and for the county of —, do hereby certify that —, the above named deponent[s], was [were] by me first sworn [or, affirmed] to testify the truth, the whole truth, and nothing but the truth, in the cause pending in the — Circuit Court [or *state the court, as in the notice*], wherein — is plaintiff and — is defendant; that the foregoing deposition[s] was [were] all written by me [or, by said deponent], [or, by —, a disinterested person, in my presence, and under my direction]; and that said deponent [or, deponents severally] subscribed his [or, their respective] deposition[s] after the same had been carefully read over to him [them] by me; that the — [*adverse party*] was [was not] present [either] in person [or, by attorney] at the taking of said deposition[s]; that all of said deposition[s] was [were] taken at —, in the city [town] of —, county of —, State of —, at — [*describe place as in notice*], on the — day[s] of —, 18—, between the hours of — o'clock A. M. and — o'clock P. M. of said day[s], agreeably to the annexed notice [and commission].

In witness whereof, I hereunto subscribe my name and affix my official seal, this — day of —, 18—.

[SEAL.]

—, Notary Public.

1. **What certificate must contain.** R. S. 1881, § 430; ante, vol. 2, § 1242.

596.—Authentication of official character of officer taking deposition.

State of —, County of —.

I, the undersigned, clerk of the — Court of the County of —, State of —, certify that —, whose certificate appears to the above deposition, was, at the time of subscribing the same, a justice of the peace of — township, in said county, duly commissioned, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have, on this — day of —, 18—, hereunto affixed the seal of said court, with my signature.

[SEAL.]

—, Clerk.

1. **When official character must be authenticated.** R. S. 1881, §§ 433, 434; ante, vol. 2, § 1242.

597.—Indorsements on envelope.

John Doe	v.	Richard Roe.	Depositions of A., B., C., D. and E.F.	To —, Clerk of the — Circuit Court, — County, Indiana.
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1. How sealed and indorsed. R. S. 1881, § 431 ; ante, vol. 2, § 1243.

598.—Notice of application to publish.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Notice of Application to Publish Depositions.
C. D. }

The — in the above cause is hereby notified that on the — day of —, 18—, at — o'clock A. M., the — will apply to the clerk of said court, at his office, in the city of —, in said county, to have the depositions of — and —, taken on behalf of the —, published.
—, Attorney for —.

[*Proof of service.*]

SECTION CIX.

WRITTEN EVIDENCE.

1. COPIES OF LEGISLATIVE ACTS.

599.—Acts of other states—Certificate of secretary of state.

State of Indiana, ss.

I, —, secretary of state of the State of Indiana, hereby certify that the foregoing — pages are complete and correct copies of [sections —, —, and —], [*or*, chapters — of] what purports to be a statute book, printed under the authority of the State [territory] of — of the United States; that said statute book, from which said copy is taken, is deposited and now in the office of the secretary of

state [the state library] of the State of Indiana, and is believed by me to have been received under the authority of said State [territory] of —, which purports to have enacted the same.

Witness my hand and the seal of the State of Indiana, hereto affixed, this — day of —, 18—.

[SEAL.]

—, Secretary of State.

1. When and how secretary of state may certify. Vol. 2, § 1251.

2. When no certificate necessary. Ante, vol. 2, § 1251.

2. OF JUDICIAL RECORDS.

600.—Of other states—Certificates of clerk and judge.

State of —, County of —.

I, —, clerk of the — Court of the County of —, State [territory] of —, hereby certify that the foregoing transcript contains full, true, and complete copies of all papers, records, and proceedings had [or if only a part of the record is set out state what part] in the cause therein named, as the same appears on file and of record in my office and in my custody.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk.

State of —, County of —.

I, —, certify that I am judge [presiding magistrate], [chief justice] of the — Court of the [county of —], State [territory] of —; that —, whose name appears to the foregoing certificate, is, and was at the time said certificate was made and signed, the clerk [prothonotary] of said court, and that said certificate is in due form of law.

In witness whereof, I hereunto set my hand, this — day of —, 18—. —, Judge of the — Court.

1. Judicial records of other states, how certified. R. S. 1881, §§ 454, 472; ante, vol. 2, § 1251; *Bradford v. Russell*, 79 Ind. 64.

601.—Judgments of justices of the peace of other states.

State of —, County of —.

I, —, a justice of the peace in and for — township [the — district] of the [county of —] State [territory] of —, hereby certify that the foregoing transcript contains full, true, and complete

copies of the proceedings and judgment had before me [before —, a justice of the peace of said township (district)] in the cause therein named, as the same appears by the papers on file and the records in said cause, of which I am now the legal custodian [as the successor in said office of said —, before whom said proceedings were had], [*or state how he is in custody of the records, if not by succession*].

In witness whereof, I hereunto set my hand, this — day of —, 18—. —, Justice of the Peace.

State of —, County of —.

I, —, clerk of the — Court of the County of —, State of —, hereby certify that the above named — [whose name appears in the foregoing proceedings, was, at the time said proceedings were had and the judgment set out therein rendered, and said —], whose name appears to the above certificate, was, when said copy was taken and certified, duly commissioned and qualified to act as such justice, and his signature, attached to said certificate, is genuine.

Witness the seal of said court and my signature, this — day of —, 18—.

[SEAL.]

—, Clerk.

1. Justices' records, how certified. Ante, vol. 2, § 1251.

602.—Of justices' records of this state.

State of Indiana, County of —.

I, —, a justice of the peace in and for — township, county of —, State of Indiana, hereby certify that the foregoing transcript contains full, true, and complete copies of the proceedings and judgment in the cause therein named, as the same appears of record and by the papers on file in my office [and that I am now the legal custodian of said records and papers as the successor in office of said —, the justice before whom said proceedings were had], [*or if otherwise the legal custodian, state the facts*].

Witness my hand and seal, this — day of —, 18—.

—, Justice of the Peace. [SEAL.]

603.—Another form.

I, the undersigned, a justice of the peace of — township, in — county, Indiana, hereby certify that the foregoing is a true and complete copy of the proceedings and judgment from my [from the docket

of —, who rendered said judgment], as the same appear of record on said docket [now legally in my custody].

Witness my hand and seal, this — day of —, 18—.

[SEAL.]

—, Justice of the Peace.

1. What certificate must contain. R. S. 1881, § 459; ante, vol. 2, § 1251, sub. 5, and cases cited; Schroeder's McDonald, 271 et seq.

604.—Of judgments of circuit or superior courts of this state.

State of Indiana, — County.

I, —, clerk of the — Circuit Court [Superior Court of — county], of the State of Indiana, hereby certify that the foregoing transcript contains full, true, and complete copies of the proceedings and judgment therein named, as the same appear of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

1. What certificate must contain. R. S. 1881, § 462; ante, vol. 2, § 1251, sub. 4, and cases cited; *Adams v. Lee*, 82 Ind. 587; *Anderson v. Ackerman*, 88 Ind. 481.

2. Records of United States courts sitting in this state, how authenticated. *Bradford v. Russell*, 79 Ind. 64.

3. OF PUBLIC RECORDS NOT JUDICIAL.

605.—Recorder's certificate to copy of record of deed in this state.

State of Indiana, — County.

I, —, recorder of the county of —, State of Indiana, hereby certify that the foregoing is a true and complete copy of the record of a deed from — to —, as the same appears by the records of my office, in my custody, and of which I am the keeper.

In witness whereof, I hereunto set my hand and the seal of said office, at —, Indiana, this — day of —, 18—.

[SEAL.]

—, Recorder of — County.

1. What sufficient certificate. R. S. 1881, § 462; ante, vol. 2, § 1254; *Painter v. Hall*, 75 Ind. 208.

606.—Authentication of record of other state, territory, or country.

[Give certificate of keeper of record or instrument, as in preceding form, and add the following:]

I, —, presiding justice of the — Court of — County [parish], [district] of the State of — [governor], [secretary of state], [chancellor], [keeper of the great seal] of —, hereby certify that the foregoing attestation is in due form, and that —, whose name appears thereto as — [recorder of said county of —], is the proper officer to make the same.

In witness whereof, I have hereunto set my hand and the [great] seal of —, this — day of —, 18—.

[SEAL.]

— —.
— —.

[If the foregoing certificate is by the presiding justice of a court, add the following:]

I, —, clerk [prothonotary] of the — Court of —, hereby certify that —, whose name appears to the foregoing attestation as presiding justice of said court, is, and was at the time of signing the same, duly commissioned and qualified as such presiding justice.

Witness my hand and the seal of said court, hereto annexed, this — day of —, 18—. —, Clerk.

1. What sufficient authentication of foreign records. R. S. 1881, § 455; ante, vol. 2, § 1254.

As to certificates necessary in authenticating other public documents and records, see ante, vol. 2, § 1255.

4. SECONDARY EVIDENCE.

607.—Notice to produce original instrument.

State of Indiana, County of —.
In the — Circuit Court, — Term, 18—.

A. B. }
v. } Notice to produce Papers to be used in Evidence.
C. D. }

The — in the above entitled cause is hereby notified to produce on the trial thereof, to be used as evidence, the following [*describe particularly the papers called for*]. If said — are not produced, secondary evidence of their contents will be given.

—, —, 18—.

—, Attorney for —.

1. **How foundation laid for secondary evidence.** Ante, vol. 2, §§ 1257, 1259; *Duringer v. Moschino*, 93 Ind. 495.

608.—Notice of motion for order to produce books or papers for inspection.

[Caption.]

The — will take notice that on the — day of —, 18—, at — o'clock A. M., or as soon thereafter as counsel can be heard, the — will, at the court room of the — Circuit Court, in the city of —, move the court for an order requiring the — to produce in court, for the inspection of the —, and to be used as evidence on the trial of said cause, the following [books and] papers [*describe them particularly*], and that the — be allowed to take copies thereof.

—, —, 18—.

—, Attorney for —.

[Proof of service.]

609.—Affidavit in support of motion for inspection of papers.

[Caption.]

—, being duly sworn, says that he is the — in the above entitled cause.

That the — has in his possession the following books and papers: [*describe them particularly*].

That said books and papers are [contain matter] [necessary and] material as evidence for this — on the trial of said cause, and it is necessary for the proper prosecution [defense] of this cause that this — should have an inspection of said books and papers, and be allowed to take copies thereof.

[Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

[SEAL.]

—, Notary Public.

610.—Order to produce papers.

[Caption.]

This cause coming on for hearing on the motion of the — for an order upon the — to produce, for inspection, certain books and papers, and that the — be allowed to take copies of the same, and the court having heard the evidence, and being satisfied in the premises, it is ordered that the — produce in this court, on the — day of —, 18—, at — o'clock A. M., for the inspection of the — and his counsel, the following books and papers: [*describe them particularly, as in the notice of motion*].

It is further ordered that the — be allowed to take copies thereof,

and that said books and papers be produced on the trial of this cause, to be used in evidence.

1. What notice and order must contain. Ante, vol. 2, § 1257.

611.—Affidavit in discharge of order to produce books and papers.

[*Caption.*]

—, being duly sworn, on his oath says that the papers named and described in the order of this court, made and entered on the — day of —, 18—, requiring him to produce the same for the inspection of the —, were not, at the time the notice of the application for said order was given, nor have they since been, in his possession or under his control, and he could not then, and can not now, produce the same, as required by said order.

[*Jurat.*]

[*Signature.*]

1. Rule to produce, how discharged. Ante, vol. 2, § 1257.

FINDINGS—VERDICT.

SECTION CX.

FINDINGS AND CONCLUSIONS.

612.—Request for findings and conclusions of law.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Request for Findings.
C. D. }

The — in the above entitled cause hereby requests the court to find the facts specially therein and the conclusions of law thereon.

—, Attorney for —.

1. Request necessary. Ante, vol. 1, §§ 803, 809; *Bodkin v. Merit*, 102 Ind. 293.

2. Request, when and how made. Ante, vol. 1, § 804; *Trentman v. Eldridge*, 98 Ind. 525; *Western Union Tel. Co. v. Frissal*, 98 Ind. 566.

3. How request shown on appeal. *Smith v. Uhler*, 99 Ind. 140; post, p. 489, 492.

613.—Findings and conclusions.

[*Caption.*]

The court, at the request of the —, makes the following findings of facts in this cause and the conclusions of law thereon:

The court finds the facts to be:

1. That [*etc.*]

2. That [*etc.*]

And as conclusions of law upon the facts the court finds:

1. That [*etc.*]

2. That [*etc.*]

—, Judge.

1. What findings and conclusions should contain. Ante, vol. 1, §§ 805–808; *Smith v. Goodwin*, 86 Ind. 300; *Knox v. Trifalet*, 94 Ind. 346.

2. Court can not change findings after their entry. *Wray v. Hill*, 85 Ind. 546. But see *Gulick v. Connelly*, 42 Ind. 134; ante, vol. 1, § 807.

3. When must be entered. *Jones v. Swift*, 94 Ind. 516; *Smith v. Uhler*, 99 Ind. 140.

4. Exceptions, when and how taken. Ante, § 809; post, p. 475; *Western Union Tel. Co. v. Trissal*, 98 Ind. 566; *Smith v. McKean*, 99 Ind. 101.

5. How objections made to insufficient findings. Ante, vol. 1, §§ 810, 970, 971; *Knox v. Traftalet*, 94 Ind. 346; *Quick v. Brenner*, 101 Ind. 230.

See NEW TRIAL—VENIRE DE NOVO, p. 432.

614.—Motion to make more specific and to strike out parts.

[*Caption.*]

The — moves the court to make the findings more specific in the above cause in the following particulars: [*state in what respect the findings should be amended.*]

Also to amend said findings by striking out the following parts thereof [*state what*], for the reason that so much of said findings are outside of the issues in the cause and are surplusage.

—, Attorney for —.

1. When motion should be made. *Knox v. Traftalet*, 94 Ind. 346; *Quick v. Brenner*, 101 Ind. 230.

As to the proper remedy where findings and conclusions, as entered, are defective, see ante, vol. 1, §§ 810, 970–972; *Quick v. Brenner*, 101 Ind. 230; *Deeter v. Sellers*, 102 Ind. 458; post, p. 438.

For further forms affecting special findings and conclusions, see JUDGMENTS, p. 448; NEW TRIAL AND VENIRE DE NOVO, p. 438; BILLS OF EXCEPTION, p. 475; ASSIGNMENT OF ERRORS, p. 492.

SECTION CXI.

VERDICT.

1. GENERAL VERDICT.

615.—Several forms.

(a.) For plaintiff.

We, the jury, find for the plaintiff [and assess his damages at — dollars].
—, Foreman.

(b.) For defendant.

We, the jury, find for the defendant. —, Foreman.

(c.) For plaintiff and part of defendants.

We, the jury, find for the plaintiff as against the defendants, — and —, and assess his damages at — dollars, and we find for the defendants, — and —. —, Foreman.

(d.) Where there is a counter-claim.

We, the jury, find for the defendant as to the issue formed upon the plaintiff's complaint, and find for the defendant on his counter-claim, and assess his damages at — dollars. —, Foreman.

1. What general verdict should contain. Ante, vol. 1, §§ 836-842, 970; *Daniels v. McGinnis*, 97 Ind. 549; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309. See *VENIRE DE NOVO*, p. 438.

2. Where there is a set-off or counter-claim. Ante, vol. 1, § 845.

616.—Replevin—Form of verdict.

We, the jury, find for the plaintiff; that he is [the owner and] entitled to the possession of the property described in the complaint; that the defendant unlawfully [took and] detains the same; that said property is of the value of — dollars, and we assess the plaintiff's damages at — dollars. —, Foreman.

617.—Same—Part of property or plaintiff, part for defendant.

We, the jury, find that the plaintiff is entitled to the possession of the following property, described in the complaint [*describe it particularly*]; that it is of the value of — dollars; that the defendant unlawfully [took and] detains the same, and we assess the plaintiff's damages at — dollars.

We find that the defendant is entitled to the possession of the following of the property described in the complaint [*describe it particularly*]; that it is of the value of — dollars, and that the defendant did not unlawfully take or detain the same [*or, as to the balance of the property described in the complaint, we find for the defendant*]. —, Foreman.

1. What sufficient verdict in replevin. Ante, vol. 1, § 846; vol. 2, § 1507; *Payne v. June*, 92 Ind. 252.

2. General verdict for defendant, effect of. Ante, vol. 1, § 846; *Baldwin v. Burrows*, 95 Ind. 81.

2. SPECIAL VERDICT.

618.—General form.

[*Caption.*]

We, the jury, return the following special verdict in the above cause :

1. That [*etc.*]

2. That [*etc.*]

[*State facts fully, but not the evidence.*]

If, upon the foregoing facts, the law is with the plaintiff, we find for the plaintiff, and assess his damages at — dollars.

If the law is with the defendant, we find for the defendant.

—, Foreman.

1. What special verdict should contain. Ante, vol. 1, § 851; *Johnson v. Putnam*, 95 Ind. 57; *Pittsburg, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Gordon v. Stockdale*, 89 Ind. 240; *Indianapolis, etc., Ry. Co. v. Bush*, 101 Ind. 582; *Parmater v. The State*, 102 Ind. 90; *Hasselman v. Carroll*, 102 Ind. 153; *Dawson v. Shirk*, 102 Ind. 184; *Carver v. Carver*, 83 Ind. 368; *Louisville, etc., Ry. Co. v. Balch*, 4 N. E. Rep. 288.

2. Remedy where special verdict is defective. Ante, vol. 1, §§ 851, 970–973; *Indianapolis, etc., Ry. Co. v. Bush*, 101 Ind. 582.

3. SPECIAL INTERROGATORIES.

619.—General form.

[*Caption.*]

The — submits the following special interrogatories in the above entitled cause, and asks the court that the jury be required to answer the same in connection with their general verdict.

1. [*Set out the questions as directly and briefly as possible.*]

—, Attorney for —.

1. Form of interrogatories. Ante, vol. 1, § 855.

2. When court must require an answer. Ante, vol. 1, § 853; *Summers v. Greathouse*, 87 Ind. 205; *Clegg v. Waterbury*, 88 Ind. 21; *Miller v. White River School Tp.*, 101 Ind. 503.

3. How answered. Ante, vol. 1, §§ 853, 860.

4. Failure to answer, effect of. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551.

5. When answers control general verdict. Ante, vol. 1, § 861; *Jewett v. Meech*, 101 Ind. 289.

6. Not binding on court in equity cases. *Jennings v. Durham*, 101 Ind. 391.

See JUDGMENTS, p, 447.

NEW TRIAL—VENIRE DE NOVO

SECTION CXII.

NEW TRIAL.

620.—Motion for new trial—General form.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Motion for New Trial.
C. D. }

The plaintiff [defendant] in the above entitled cause moves the court for a new trial thereof, on the following grounds :

1. The court erred in refusing to grant plaintiff [defendant] a continuance of the trial of the cause.

2. The court erred in refusing to grant [granting] plaintiff [defendant] a change of venue.

3. The court erred in allowing plaintiff [defendant] to amend his complaint [answer] [reply] on the trial of the cause.

4. The court erred in overruling [sustaining] plaintiff's [defendant's] motion to suppress [strike out the following parts (*describe the parts*)] of the deposition of —.

5. The court erred in overruling [sustaining] plaintiff's [defendant's] motion to separate the witnesses during the hearing of the testimony.

6. The court erred in sustaining the motion of the plaintiff [defendant] to reinstate the cause on the docket of the — Circuit Court when a change of venue had been granted to the — Circuit Court.

7. The court erred in fixing the time for perfecting the change of venue taken by plaintiff [defendant] at — days, the time being too short.

8. The court erred in dismissing plaintiff's [defendant's] appeal from —, justice of the peace.

9. The court erred in permitting —, attorney for plaintiff [defendant], to make the following argument [statement in his argument] to the jury: [*state the objectionable argument or statement.*]

10. The court erred in compelling plaintiff [defendant] to go to trial before the cause was at issue, no answer [reply] having been filed by defendant [plaintiff].

11. The plaintiff [defendant] was guilty of misconduct in said cause, in this: [*set out the misconduct specifically.*]

12. The jury [—, one of the jurors] were [was] guilty of misconduct, in this: [*set out the acts of misconduct particularly.*]

13. The plaintiff [defendant] was, by accident [surprise], which ordinary prudence could not have guarded against, prevented from having a fair trial, in this: [*state particularly the facts showing the accident or surprise, and that it could not have been guarded against by ordinary prudence.*]

14. The damages assessed by the court [jury] are excessive.

15. The assessment of the amount of recovery is erroneous, being too large [small].

16. The verdict of the jury [decision of the court] is not sustained by sufficient evidence.

17. The verdict of the jury [decision of the court] is contrary to law.

18. The special findings of the court, numbered —, —, and — are not sustained by sufficient evidence.

19. The plaintiff [defendant] has, since the trial, discovered evidence material to his action [defense], as follows: [*describe it particularly, and if the testimony of a witness, give name and the facts to which he will testify*], which evidence was unknown to him at the time of the trial, and he could not, with reasonable diligence, have discovered and produced the same at the trial.

20. The court erred in admitting in evidence [*describe briefly the evidence, e. g.*] the testimony of the witness, —, as to the contents of the —, without proof of the loss of said instrument or other evidence laying a foundation for secondary evidence of its contents.

21. The court erred in excluding the following evidence, offered by the plaintiff [defendant]: [*describe briefly.*]

22. The court erred in allowing [refusing to allow] plaintiff [defendant] the open and close in the trial of the cause.

23. The court erred in permitting — to sit as a juror in the cause over the challenge and objection of plaintiff [defendant].

24. The court erred in sustaining the challenge of plaintiff [de-

fendant] to —, called as a juror in this cause, and in discharging said — from the jury.

25. The court erred in entering judgment against defendant without service of process on or appearance by him, and without a default having been taken against him.

26. The court erred in overruling [sustaining] plaintiff's [defendant's] objection to the form of the verdict [answers to interrogatories] of the jury, and in refusing to require the jury to correct the same [answer the same more fully].

27. The court erred in giving [refusing to give] instructions numbered —, —, —, and —, on its own motion [asked by plaintiff (defendant)].

28. The court erred in modifying instruction number —, asked by plaintiff [defendant] by [*state what modification was made*], and in refusing to give said instruction as asked, and giving the same as modified.
—, Attorney for —.

1. Causes for a new trial. (a.) *Generally.* Ante, vol. 1, §§ 866, 877-932; *Hodges v. Bales*, 102 Ind. 494; *Scott v. The State*, 102 Ind. 277.

(b.) *Improper argument of counsel.* Ante, vol. 1, § 884; *Rudolph v. Landwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Shuler v. The State*, 4 North-East Rep. 870, and cases cited in note; *Campbell v. Maher*, 4 North-East Rep. 911.

(c.) *Misconduct of juror.* Ante, vol. 1, §§ 886-896; *Jones v. The State*, 89 Ind. 82; *Toohy v. Sarvis*, 78 Ind. 474; *Carter v. Ford Plate Glass Co.*, 85 Ind. 181; *Harper v. The State*, 101 Ind. 109. See AFFIDAVIT, p. 436.

(d.) *Newly discovered evidence.* Ante, vol. 1, §§ 918-926; *Kotchel v. Bartlett*, 88 Ind. 237; *Zeller v. Griffith*, 89 Ind. 80; *Hines v. Driver*, 100 Ind. 315; *Harper v. The State*, 101 Ind. 109; *Marks v. The State*, 101 Ind. 353; *Turner v. The State*, 102 Ind. 425. See AFFIDAVIT, p. 435.

(e.) *Accident or surprise.* Ante, vol. 1, §§ 898-903; *Hehn v. First Nat'l Bank of Huntington*, 91 Ind. 44; *Pittsburg, Cincinnati, etc., Ry. v. Sponier*, 85 Ind. 165; *Gardner v. The State*, 94 Ind. 489; *Dowell v. The State*, 97 Ind. 310. See AFFIDAVIT, p. 437.

2. What motion must contain. Ante, vol. 1, § 869 et seq.; *Secor v. Souder*, 95 Ind. 95; *Johnson v. McCulloch*, 89 Ind. 270; *McCammack v. McCammack*, 86 Ind. 387; *Elliott v. Russell*, 92 Ind. 526.

3. When must be filed. Ante, vol. 1, § 868; *Jones v. Jones*, 91 Ind. 72; *Secor v. Souder*, 95 Ind. 95; *Dodge v. Pope*, 93 Ind. 480.

For further forms under NEW TRIAL, see COMPLAINT, p. 251.

621.—Motion for new trial as of right.

[Caption.]

The plaintiff [defendant] moves the court for a new trial of this action, as of right, and tenders herewith his undertaking, with — as surety, conditioned as required by law.
[Signature.]

1. In what cases new trial may be had as of right. Ante, vol. 1, §§ 961, 969; *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Bitting v. Ten Eyck*, 85 Ind. 357; *Butler University v. Conard*, 94 Ind. 353; *Miller v. Evansville Nat'l Bank*, 99 Ind. 272; *Hammann v. Mink*, 99 Ind. 279.

2. What motion must contain and how made. Whether the motion must be in writing or not has been a disputed question. When the first and second volumes of this work were issued it was decided by the then latest case that the motion must be in writing and contain certain allegations of fact. Ante, vol. 1, § 962; *Crews v. Ross*, 44 Ind. 481; *Busk. Prac.* 263.

But the supreme court has since overruled the case of *Crews v. Ross*, both as to the necessity of a written motion or complaint and as to the matter required to be set out in the motion. *The Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Heberd v. Wines*, 4 N. E. Rep. 457.

622.—Undertaking.

[Caption.]

We undertake that the plaintiff [defendant] in the above entitled cause shall pay all costs and damages which shall be recovered against him therein.

[Signatures.]

Approved by me, this — day of —, 18—.

—, Clerk [Judge] —, Circuit Court.

1. Undertaking required. Ante, vol. 1, § 964.

623.—Notice of granting of new trial as of right.

[Caption.]

The plaintiff [defendant] in the above entitled cause is hereby notified that on the — day of —, 18—, in the — Circuit Court, the plaintiff [defendant] was by the court granted a new trial thereof as of right.

[Signature.]

Dated this — day of —, 18—.

1. When notice necessary. Ante, vol. 1, § 965. Practice generally, see vol. 1, §§ 960-969.

AFFIDAVITS IN SUPPORT OF MOTION FOR NEW TRIAL.

624.—For newly discovered evidence—Affidavit of party.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

A. B. }
v. } Affidavit in support of Motion for New Trial.
C. D. }

—, being duly sworn, says that he is the plaintiff [defendant] in the above entitled cause.

That before the trial of this cause he made diligent inquiry for evidence to sustain the allegations of his complaint [answer], [or, the allegation in his complaint (answer) that (*state what*)], and especially inquired of one —, then living in the neighborhood, if he knew any thing about the matters in controversy, stating to him what they were, as they are alleged in the pleadings herein, and was informed by said — that he did not; that affiant did not know until after the trial of this cause that said — knew or would testify to the facts herein-after stated, but learned the same for the first time on the — day of —, 18—; that he could not, by reasonable diligence, have discovered that he would testify to said facts before the trial of this cause; that he has discovered since that said — knows and will now testify to the following facts: [*set out the facts particularly*]; that he can not prove said facts by any other witness, and that he believes said facts to be true. The affidavit of said — is filed herewith, and referred to and made part of this affidavit [or, the affidavit of said — can not be procured and filed herewith, for the reason that [*state the reasons particularly*].

[Jurat.]

[Signature.]

625.—Affidavit of witness.

[Caption.]

—, being duly sworn, on his oath, says that he is a resident of the county of —, State of —, and will testify, on the trial of this action, to the following facts: [*state the facts particularly*].

That, on inquiry of plaintiff [defendant] before the trial of this cause, he denied having any knowledge of said facts, but after said trial disclosed to plaintiff [defendant] for the first time that he knew and would testify to them.

[Jurat.]

[Signature.]

1. What showing necessary. Ante, vol. 1, §§ 918-926, 952-959; vol. 3, pp. 251, 252. 432-434; *Gardner v. The State*, 94 Ind. 489; *Test v. Larsh*, 100 Ind. 562.

626.—Affidavit of misconduct of jury.

[Caption.]

—, being duly sworn, says that he is the plaintiff [defendant] in this cause; that after the jury had retired to their room to consult of their verdict, it was proposed by —, one of their number, that each juror put down on paper such amount as he thought the plaintiff should recover; that —, one of their number, be designated and appointed clerk to add the twelve sums, divide the aggregate amount by twelve, and report the result, which sum should be adopted and

returned as the verdict for plaintiff, which was agreed to, and each juror set down in writing the amount for which he was in favor of finding for plaintiff, the sums set down by the several jurors differing in amount; that said — added said sums together, and divided the aggregate thereof by twelve, the result being the sum of — dollars; that, as previously agreed upon, said sum of — dollars was taken as the amount due the plaintiff, and verdict was returned therefor accordingly.

[*Jurat.*]

[*Signature.*]

See ante, vol. 1, §§ 886–896; vol. 3, pp. 432–434.

627.—Affidavit of accident and surprise.

[*Caption.*]

—, being duly sworn, says that he is the plaintiff [defendant] in this cause.

That on — he caused a *subpœna duces tecum* to be issued to S. P. B., secretary of The Safe Deposit Company, to appear on the day and at the hour fixed for the trial of this action, and bring with him for use in evidence on the trial a manuscript volume entitled “Record of,” etc., 1883.

That the subpœna was served upon the said S. P. B., on Friday, the 13th day of April, 1883.

That at six o'clock on the morning of Monday, the 16th day of April, 1883, the said witness, having in custody said manuscript volume, arrived at Plum Street Depot, intending to take the train for L. at 6:12 o'clock, and so informed the plaintiff by a telegram, attached hereto.

That, relying upon the appearance of said witness with said volume, plaintiff went into trial.

That, because of a change unknown to the plaintiff and to the witness, said train departed [not from the Plum Street Depot, but] from the Grand Central Passenger Station, on Central avenue], whereby said witness failed to reach and take the same and to appear on the trial.

That plaintiff expected to prove, and will prove, by said manuscript volume, and can not otherwise prove, that Jane Neal was married to John Neal, at the residence of C. C., in Dearborn county, Indiana, on the — day of —, 1880.

That said witness, S. B. P., is now in court, and has with him said manuscript volume for production, inspection, and use upon the trial.

[*Jurat.*]

[*Signature.*]

1. **What sufficient showing.** Ante, vol. 1, §§ 898–903; vol. 3, p. 434, note.

For the practice in making proof in applications for a new trial, see ante, vol. 1, §§ 947–950.

SECTION CXIII.

VENIRE DE NOVO.

628.—General form of motion.

State of Indiana, ——— County.

In the ——— Circuit Court, ——— Term, 18—.

<div style="border-top: 1px solid black; width: 50px; height: 15px; margin-bottom: 5px;"></div> <div style="border-top: 1px solid black; width: 50px; height: 15px; margin-bottom: 5px;"></div>	}	v. Motion for Venire de Novo.
---	---	------------------------------------

The plaintiff [defendant] moves the court for a venire de novo herein for the following reasons :

1. The verdict [special verdict] of the jury [special findings of the court] is [are] so defective, uncertain, and ambiguous, that no judgment can be rendered thereon.

2. The verdict [findings] does [do] not assess plaintiff's damages.

3. The findings contain the evidence, and not the facts established by the evidence. [Signature.]

1. Grounds for a venire de novo. Ante, vol. 1, §§ 970-973; Carver v. Carver, 83 Ind. 368; Bedford, etc., Ry. Co. v. Rainbolt, 99 Ind. 551; Quick v. Brenner, 101 Ind. 230; Deeter v. Sellers, 102 Ind. 458; Thayer v. Burger, 100 Ind. 262; Orr v. Miller, 98 Ind. 436; ante, p. 431.

2. When motion for must be made. Ante, vol. 1, § 974.

JUDGMENTS.

SECTION CXIV.

1. JUDGMENTS BY DEFAULT.

629.—General form—Money judgment.

[*Caption.*]

Comes the plaintiff [by his attorney, —], and it appearing to the court by the summons herein and the return of the sheriff [affidavit of —] indorsed thereon, copies of which summons and return [affidavit] are in the words and figures following: [*here insert*], that the defendant has been duly served with process more than ten days before the first day of the present term of this court [before the day summons was made returnable, as required by indorsement of plaintiff on his complaint], said defendant is three times audibly called in open court, but comes not, and makes default.

And the court having heard the evidence, and being advised in the premises, finds for the plaintiff that the allegations of his complaint are true; that there is due him from the defendant and unpaid the sum of — dollars on the — sued on.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, together with his costs and charges in this behalf laid out and expended.

1. When judgment by default may be taken. Ante, vol. 1, §§ 448-457; *Lilly v. Dunn*, 96 Ind. 220.

2. JUDGMENTS IN ABATEMENT.

630.—For plaintiff.

— } Judgment.
v. }
— }

This cause being at issue on the answer of defendant in abatement, is submitted to the court for trial thereon, and the court having heard

the evidence and being advised in the premises, finds for the plaintiff on said issue.

It is therefore ordered and adjudged by the court that the defendant plead over, and that the plaintiff recover of defendant his costs and charges laid out and expended herein to this time. To which defendant excepts.

631.—For defendant.

— }
v. } Judgment.
— }

This cause being at issue on the answer of defendant in abatement, is submitted to the court for trial thereon, and the court having heard the evidence and argument of counsel, and being fully advised in the premises, finds for the defendant on said issue.

It is therefore considered and adjudged by the court that this action do abate [and that the defendant recover of the plaintiff his costs and charges herein laid out and expended]. To which plaintiff excepts.

1. Forms of judgments in abatement. R. S. 1881, § 365; ante, vol. 1, § 982.

3. JUDGMENTS BY AGREEMENT AND CONFES- SION.

632.—On agreed case.

— }
v. } Judgment.
— }

Come the parties, and this cause is submitted to the court on the agreed statement of facts filed herein, and the court having seen and examined said agreed statement, and being advised in the premises, finds for the plaintiff [defendant] that there is due him from the defendant [plaintiff] and unpaid the sum of — dollars [*or state the relief to which he is entitled*].

It is therefore considered and adjudged that the plaintiff [defendant] recover of the defendant [plaintiff] said sum of — dollars, together with his costs in this cause laid out and expended. To which the defendant [plaintiff] excepts.

1. Practice in agreed cases. Ante, vol. 1, §§ 249, 811–813, 997; vol. 3, p. 7.

633.—By agreement.

— }
v. } Judgment.
 — }

Come the parties, and agree that judgment may be rendered for the plaintiff for — dollars and his costs, collectible without relief from valuation and appraisement laws, to draw interest from its rendition, at the rate of — per cent per annum, but that the same shall not be enforced by execution, or otherwise, for the term of — months from its date. And the court renders judgment on said agreement.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant — dollars, together with his costs and charges in this cause laid out and expended, this judgment to draw interest at the rate of — per cent per annum, and not to be enforced by execution or otherwise for the term of — months.

1. Judgment by agreement and its effect. Ante, vol. 1, § 998.

634.—Offer to allow judgment.

[Caption.]

To —, Plaintiff:

The defendant offers to allow judgment to be taken in your favor, against him, in the above entitled cause, for — dollars [the property described in your complaint] and all costs accrued and to accrue.

Dated this — day of —, 18—.

[Proof of service.]

[Signature.]

1. Practice in case of offer to allow judgment. Ante, vol. 1, § 999.

635.—Acceptance of offer.

[Caption.]

To —, Defendant:

Your offer of the — day of —, 18—, to allow judgment to be taken against you in this cause for — dollars, with costs accrued and to accrue, is hereby accepted.

Dated this — day of —, 18—.

[Proof of service.]

[Signature.]

1. Offer, how accepted. Ante, vol. 1, § 999.

636.—Judgment on offer and acceptance.

— }
v. } Judgment.
 — }

The defendant having served on plaintiff his offer to allow judgment to be entered against him herein for the sum of — dollars, with costs and accruing costs, and plaintiff having duly accepted said offer, the court renders judgment accordingly.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, together with his costs in this cause laid out and expended.

637.—Offer to confess judgment—Notice.

To —:

You are hereby notified that I will, on the — day of —, 18—, at — o'clock A. M., or as soon thereafter as the matter can be heard, in the — Circuit Court, at the court-house in —, offer to confess judgment in said court, in your favor, for — dollars, on a promissory note for — dollars, bearing date the — day of —, 18—.

[*or state other cause of action*] held by you against me.

Dated this — day of —, 18—.

[*Signature.*]

[*Proof of service.*]

1. **Notice of offer.** Ante, vol. 1, § 1000; *Homer v. Pilkington*, 11 Ind. 440.

2. **When must be accepted—Effect of failure.** Ante, vol. 1, § 1000.

638.—Judgment on acceptance of offer.

— }
v. } Judgment.
 — }

The defendant having, after due notice to the plaintiff, offered to confess judgment herein for — dollars, without suit, and the plaintiff having accepted the same within the term, the court renders judgment accordingly

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, together with the costs of this proceeding.

639.—Confession of judgment—Affidavit—Consent of plaintiff.

[*Caption.*]

plaintiff.

I, —, the defendant in this cause, acknowledge myself indebted to the plaintiff in the sum of — dollars, and hereby confess judgment for said sum, with costs.

Dated this — day of —, 18—.

[*Signature.*]

I, —, plaintiff in this cause, hereby consent to the rendition of judgment in my favor against the defendant for — dollars, with costs as confessed by defendant.

Dated this — day of —, 18—.

[Signature.]

[Caption.]

—, the above named defendant, being duly sworn, on his oath says that the debt sued for herein is just and owing, and that the confession of judgment by him for the sum of — dollars, with costs, is not made for the purpose of defrauding his creditors.

[Jurat.]

[Signature.]

1. What necessary to a valid confession of judgment. Ante, vol. 1, §§ 1001–1003.

640.—Judgment on confession.

— }
v. } Judgment.
— }

Come the parties, and the defendant files his written confession of judgment herein for the sum of — dollars, with costs, and his affidavit that the debt sued on is just and owing, and that he does not confess judgment herein to defraud his creditors; and the plaintiff having consented [in writing] to the rendition of judgment as confessed, the court renders judgment on said confession.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the sum of — dollars, together with his costs and charges in this cause laid out and expended.

1. Form of judgment by confession. The statute provides that the "debt or cause of action shall be briefly stated in a writing, to be filed and copied into the judgment." R. S. 1881, § 587.

But this is held to apply only where there is a confession without any pleadings having been filed. Ante, vol. 1, § 1001.

Where the cause of action is stated in the complaint, this is sufficient without repeating it in the judgment.

4. JUDGMENTS ON DEMURRER.

641.—Judgment for plaintiff on overruling demurrer to complaint.

—	}	Judgment.
v.		
—		

Come the parties, and the demurrer of defendant to plaintiff's complaint having been overruled, and the defendant failing and refusing to answer said complaint, the court renders judgment on the demurrer.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the sum of — dollars, together with his costs and charges in this behalf laid out and expended [collectible without relief from valuation or appraisement laws]. To which defendant excepts.

1. When judgment may be rendered on overruling of demurrer.

Ante, vol. 1, § 987.

642.—For defendant—Demurrer to complaint sustained.

—	}	Judgment.
v.		
—		

Come the parties, and the demurrer of defendant to plaintiff's complaint having been sustained, and the plaintiff failing and refusing to amend his complaint or plead further, abides said ruling, and the court renders judgment on the demurrer.

It is therefore considered and adjudged by the court that the plaintiff take nothing by this action, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended. To which plaintiff excepts.

1. Demurrer sustained—When judgment may be rendered.

Ante, vol. 1, § 987.

643.—For defendant on demurrer to answer.

—	}	Judgment.
v.		
—		

Come the parties, and the demurrer to defendant's answer being overruled, and the plaintiff failing and refusing to plead further, abides said ruling, and the court renders judgment on the demurrer.

It is therefore considered, etc [follow preceding form.]

644.—For defendant on demurrer to reply.

— }
 v. } Judgment.
 — }

Come the parties, and the demurrer of defendant to the plaintiff's reply having been sustained, and the plaintiff failing and refusing to amend or plead further, abides said ruling, and the court renders judgment on the demurrer.

It is therefore considered and adjudged by the court that the plaintiff take nothing by this action, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended. To which the plaintiff excepts.

645.—For plaintiff on demurrer to evidence.

— }
 v. } Judgment.
 — }

Come the parties, and this cause being at issue is submitted to a jury for trial, and the evidence [of the plaintiff] being heard, the defendant demurs to plaintiff's evidence, and his demurrer is overruled, to which the defendant excepts, and the cause being submitted to the court for trial, as to the assessment of plaintiff's damages, and the court having heard the evidence and being advised in the premises, assesses plaintiff's damages at — dollars, and judgment on said demurrer is rendered accordingly.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, together with his costs and charges in this cause laid out and expended [collectible without relief from valuation or appraisement laws] [this judgment to draw interest at the rate of — per cent per annum]. To which the defendant excepts, and prays an appeal to the Supreme Court of the state, which is granted [upon his filing his appeal bond during the term (on or before the — day of —, 18—), with surety to the approval of the clerk of this court in the sum of — dollars], and the defendant now files his appeal bond in the sum of — dollars, with — as his surety, which bond is approved by the court.

646.—For defendant on demurrer to evidence.

— }
 v. } Judgment.
 — }

Come the parties, and this cause being at issue and on trial before a jury, and the evidence [of the plaintiff] being heard, the defendant

demurs thereto as follows: [*here insert*], and said demurrer is sustained, to which the plaintiff excepts, and the jury is discharged, and the court renders judgment on the demurrer.

It is therefore considered and adjudged that the plaintiff take nothing by his action, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended.

1. Practice in case of demurrer to evidence. Ante, vol. 1, §§ 548-552; vol. 3, pp. 329

5. JUDGMENTS ON PLEADINGS.

647.—Non obstante veredicto.

— }
v. } Judgment.
— }

Come the parties by counsel, and the jury having heretofore rendered a verdict for the defendant, the plaintiff moves the court for judgment in his favor, on the pleadings, notwithstanding said verdict; and the court being fully advised in the premises, sustains said motion, to which the defendant excepts, and having heard the evidence and argument of counsel upon the assessment of damages the court assesses the same at — dollars.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, notwithstanding the verdict of the jury, together with his costs and charges herein laid out and expended. To which the defendant excepts.

1. When judgment may be given on the pleadings, notwithstanding the verdict. Ante, vol. 1, § 986; *Hartlep v. Cole*, 101 Ind. 458.

6. JUDGMENTS ON VERDICT AND FINDINGS.

648.—On verdict of jury—General form.

— }
v. } Judgment.
— }

Come the parties, and the jury having returned their verdict herein, the court renders judgment thereon.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the sum of — dollars, together with his costs in this cause laid out and expended.

[Or, That the plaintiff take nothing by his action, and that the defendant recover of the plaintiff his costs and charges in this cause laid

out and expended.] [*Or state any other relief in accordance with the verdict returned.*]

1. How judgment on verdict must be rendered. Ante, vol. 1, § 981. See VERDICT, ante, vol. 1, §§ 836-848; vol. 3, pp. 429-431.

649.—On special verdict.

— } Judgment.
v. }

Come the parties, and the jury having returned into court their special verdict, and the court having ordered judgment thereon for the plaintiff in the sum of — dollars found by said verdict [*or, for defendant*], the court renders judgment accordingly.

It is therefore considered and adjudged, etc. [*continue as in preceding form.*]

1. How judgment on special verdict rendered. Ante, vol. 1, § 983.

650.—On answers to special interrogatories by the jury.

— } Judgment.
v. }

Come the parties, and the jury having returned their general verdict and answers to special interrogatories in connection therewith, and the court having ordered judgment on the answers to the special interrogatories, notwithstanding the general verdict [*or, and the plaintiff (defendant) moves the court for judgment in his favor on said answers to interrogatories, notwithstanding the general verdict, which motion is sustained, to which the defendant (plaintiff) excepts*], and the court renders judgment accordingly.

It is therefore considered and adjudged by the court that, etc. [*enter judgment as in other cases, in accordance with the special answers.*]

1. Practice in case of answers to special interrogatories. As to the practice where there are answers to special interrogatories and a general verdict, and when the answers will control and carry the judgment, see ante, vol. 1, §§ 853-865, 985; vol. 3, p. 431; Grand Rapids, etc., R. R. Co. v. McAnally, 98 Ind. 412; Jennings v. Durham, 101 Ind. 391; Jewett v. Meech, 101 Ind. 289.

651.—On special findings and conclusions of law.

v.	}	Judgment.
----	---	-----------

Come the parties, and the court having found the facts specially and its conclusions of law thereon [*or, the court now files its special findings of facts and conclusions of law thereon as follows: (here insert), and the plaintiff moves the court for judgment in his favor on said findings and conclusions, which motion is sustained by the court, to which the defendant excepts*], and the court renders judgment accordingly.

It is therefore considered and adjudged [*set out the judgment in the usual form*].

1. How judgment entered. Ante, vol. 1, § 984.

7. JUDGMENTS IN PARTICULAR CASES.

NOTE.—The general forms of money judgments, whether upon default, verdict, special findings, answers to special interrogatories, or the decision of the court, without special findings, have been sufficiently shown in the preceding pages. The object of setting out forms in particular cases is to supply such only as give some unusual or extraordinary relief, and cases involving ordinary money judgments will not be included.

ATTACHMENT.

652.—General form.

v.	}	Judgment.
----	---	-----------

Come the parties, and this cause being at issue is submitted to the court for trial, without the intervention of a jury, and the court having heard the evidence and argument of counsel, and being sufficiently advised in the premises, finds for the plaintiff that he is entitled to recover of the defendant the sum of — dollars, together with his costs and charges in this cause laid out and expended.

The court also finds for the plaintiff on the issue in the attachment proceeding that the defendant, — [*state the ground of the attachment, e. g.*], is a non-resident of this state, and plaintiff is entitled to have the property attached herein sold for the satisfaction of his debt.

It is therefore considered and adjudged by the court that the plaintiff

recover of the defendant the sum of — dollars, together with his costs and charges in this cause laid out and expended.

It is further considered and adjudged that the property attached in this action, described as follows: [*describe the property*], or so much thereof as may be necessary for that purpose, be sold as other lands are sold on execution, and that the proceeds of such sale be applied to the payment of plaintiff's claim and costs and accruing costs, and that any balance remaining be paid to the defendant.

1. Judgment, how rendered. Ante, vol. 1, § 1006; vol. 2, § 1329.

653.—On notice without personal judgment.

— }
v. } Judgment.

Comes the plaintiff by —, his attorney, and it appearing to the satisfaction of the court by the proof of publication of the notice filed in this cause, which notice and the proof of the publication thereof reads as follows [*here insert*], that the defendant has been duly notified of the pendency of this action by three successive weekly publications in the —, a newspaper of general circulation, printed and published in the English language, in the city of —, county of —, State of Indiana, the last of which publications was made more than thirty days before the first day of the present term of this court. And the defendant failing to appear, and being now three times loudly called, comes not, but makes default, and on motion of plaintiff this cause is submitted to the court for hearing and judgment on the default of the defendant.

And the court having heard the evidence, and being sufficiently advised in the premises, finds that there is due to the plaintiff from the defendant the sum of — dollars [collectible without relief from valuation or appraisal laws], and that he is entitled to have the property attached herein sold for the satisfaction of said sum and his costs and charges in this behalf laid out and expended.

It is therefore considered and adjudged by the court that there is due the plaintiff from the defendant the sum of — dollars and his costs in this cause laid out and expended.

It is further considered and adjudged that the property attached herein, to wit [*describe the property*], be sold as other property [lands] are sold on execution [without relief from valuation or appraisal laws], and that the proceeds of said sale be applied to the payment of the costs of this action accrued and to accrue and to the payment of

said sum of — dollars found due the plaintiff, and that any balance remaining be paid to the defendant.

1. How judgment rendered on constructive notice. Ante, vol. 1, § 1006; vol. 2, § 1329.

654.—Judgment where creditors have filed under.

A. B.	E. F.	G. H.	} Judgment.
<i>v.</i>	<i>v.</i>	<i>v.</i>	
C. D.	C. D.	C. D.	

Come the parties, and it appearing to the court that the above named E. F. and G. H. have, since the commencement of the above entitled cause of A. B. *v.* C. D., duly filed their several complaints, affidavits, and undertakings in attachment against the defendant, and that their claims in attachment have been duly filed under in the proceeding of A. B. *v.* C. D., and all of said several causes of action being at issue, the same are now submitted to the court for hearing and judgment, and the court having heard the evidence, and being sufficiently advised in the premises, finds as follows:

1. That the plaintiff, A. B., is entitled to recover of the defendant the sum of — dollars, together with his costs in this cause laid out and expended [collectible without relief from valuation and appraisement laws.]

2. That the plaintiff, E. F., is entitled to judgment against the defendant for — dollars, together with his costs and charges in this behalf laid out and expended [collectible without relief from valuation or appraisement laws].

3. That the plaintiff, G. H., is entitled to judgment against the defendant for — dollars, together with his costs and charges in this cause laid out and expended [collectible without relief from valuation or appraisement laws].

4. That the defendant had, prior to the bringing of the action of the plaintiff, A. B., sold and conveyed his property subject to execution, with the fraudulent intent to cheat, hinder, and delay his creditors [*or state the acts done by defendant alleged in the affidavits as ground for the attachment*].

5. That the plaintiffs are entitled to recover as to the attachment proceeding and to have the property attached herein sold for the satisfaction of their respective claims, and to share *pro rata* in the proceeds thereof.

It is therefore considered and adjudged by the court:

1. That the plaintiff, A. B., recover of the defendant the sum of — dollars, together with his costs and charges in this cause laid out

and expended [collectible without relief from valuation or appraisement laws].

2. That the plaintiff, E. F., recover of the defendant the sum of — dollars, together with his costs and charges in this cause laid out and expended [collectible without relief from valuation or appraisement laws].

3. That the plaintiff, G. H., recover of the defendant the sum of — dollars, together with his costs and charges in this cause laid out and expended [collectible without relief from valuation or appraisement laws].

4. That the property attached herein, to wit : [*describe it*], or enough thereof to satisfy plaintiffs' claims and costs, be sold by the sheriff, as other property [lands] are sold on execution, and that out of the proceeds he pay, first, the costs of this suit, including the costs of sale, and that out of the remainder he pay the several sums adjudged to be due the plaintiffs respectively ; but, in case said property shall not sell for sufficient to pay the plaintiffs' claims in full, then the amount realized therefrom shall be distributed among said claimants *pro rata*.

1. **Claims filed under.** See vol. 2, § 1322.

655.—Judgment against garnishee.

[*After findings and judgment against the principal defendant, as in other cases, proceed :*]

And —, who has been summoned as garnishee herein, having filed his answer, and this cause being at issue as to him, and the court having heard the evidence, and being advised in the premises, finds that said — is indebted to the defendant, —, on a promissory note of date the — day of —, 18—, in the sum of — dollars, collectible without relief from valuation and appraisement laws [which note falls due on the — day of —, 18—, at which time there will be due thereon the sum of — dollars], and that the said garnishee has in his possession the following property of the defendant, —, which is subject to execution, to wit : [*describe the property.*]

It is therefore considered and adjudged by the court that the plaintiff recover of said garnishee said sum of — dollars [to be paid on the — day of —, 18—, when the same falls due], and that said garnishee deliver to the sheriff the property above found to be in his possession, and that the sheriff sell the same as other property is sold on execution, etc. [*continue as in other cases.*]

It is further considered and adjudged that the plaintiff recover of said garnishee all costs and charges laid out and expended by him in the matter of said garnishment.

1. When garnishee liable to judgment for costs. R. S. 1881, § 938.

2. How judgment against garnishee should be rendered. Ante, vol. 1, § 1006; vol. 2, § 1330; *First National Bank of Indianapolis v. Armstrong*, 101 Ind. 244.

3. Effect of judgment against garnishee. Ante, vol. 1, § 1006; vol. 2, § 1331.

For practice generally in attachment, see ante, vol. 2, §§ 1310-1338.

For other forms, see ANSWER, pp. 344-346; ATTACHMENT AND GARNISHMENT, post, p. 525.

DIVORCE AND ALIMONY.

656.—General form.

— }
v. } Judgment.
— }

Come the parties [*or*, comes the plaintiff, and it appearing to the satisfaction of the court by the summons and sheriff's return thereon (notice and proof of publication thereof), which are as follows: (*here insert summons and return or notice and proof*) that the defendant has been duly served with process for more than ten days before the first day of the present term of this court (notified of the pendency of this action by three successive publications of said notice in the —, a newspaper of general circulation, printed and published in the English language at —, in the county of —, State of Indiana, the last of which publications was made more than thirty days before the first day of the present term of this court). And the defendant being three times loudly called comes not, but makes default.]

And the court having heard the evidence, and being fully advised in the premises, finds for the plaintiff that he [she] is entitled to a decree of divorce from the defendant on the grounds alleged in his [her] complaint; that he [she] is a proper and suitable person to have the care, custody, and education of the children named in the complaint, and is entitled to their custody until the further order of this court [and that the plaintiff is entitled to recover of the defendant as alimony the sum of — dollars, payable as follows: (*state the times and terms of payment*)], and that the plaintiff recover of the defendant his [her] costs and charges herein expended.

It is therefore considered and adjudged by the court that the bonds of matrimony existing between plaintiff and defendant be dissolved and the plaintiff be granted a divorce.

That the plaintiff have the care and custody of the following named children [*name them*] until the further order of this court.

[That the plaintiff recover of the defendant as alimony the sum of — dollars, payable as follows: (*state time and terms of payment.*)]

That the plaintiff recover of the defendant his [her] costs and charges in this cause laid out and expended.

1. Judgment, how rendered. Ante, vol. 2, §§ 1390, 1391, 1392.

For further forms, see COMPLAINT, p. 145; ANSWER, p. 361; CROSS-COMPLAINT, p. 409; DIVORCE AND ALIMONY, p. 552.

EJECTMENT.

657.—General form for plaintiff.

— }
v. } Judgment.
— }

Come the parties, and this cause having been submitted to the court without the intervention of a jury, and the court having heard the evidence, and being fully advised in the premises, finds for the plaintiff that he is the owner [in fee-simple] and entitled to the possession of the real estate described in the complaint; that the defendant unlawfully holds possession thereof, and that plaintiff has been damaged in the sum of — dollars.

It is therefore considered and adjudged by the court that the plaintiff is the owner [in fee-simple] of the real estate described in the complaint, to wit: [*describe it as in the complaint*], and that he recover of the defendant the possession thereof.

It is further considered and adjudged that the plaintiff recover of the defendant the sum of — dollars in damages, together with his costs and charges in this cause laid out and expended.

1. What may be recovered in an action of ejectment. Ante, vol. 1, § 337; vol. 2, § 1398; vol. 3, p. 148; *Dobbins v. Baker*, 80 Ind. 52; *Smith v. Wood*, 83 Ind. 522.

2. Judgment, how rendered. Ante, vol. 1, § 990.

ELECTION.

658.—Contest of election—Judgment for contestor.

— }
v. } Judgment.
— }

Come the parties, and this cause being submitted to the court for trial, without the intervention of a jury, and the court having heard the evidence, and being fully advised in the premises, finds for the plaintiff that the allegations of his complaint are true; that the plaintiff

received the highest number of legal votes for the office of — of — county, as alleged in the complaint, and was duly elected thereto for the term of — years from the — day of —, 18—.

It is therefore considered and adjudged by the court that the plaintiff received the highest number of votes for the said office of — of the county of —, and was duly elected thereto for the term of — years from the — day of —, 18—.

It is further considered and adjudged that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See COMPLAINT, pp. 150, 268; ANSWER, p. 362.

FORECLOSURE.

See MORTGAGES, p. 459.

FRAUDULENT CONVEYANCES.

659.—Personal judgment for plaintiff and setting aside deed.

— }
v. } Judgment.
— }

Come the parties, and the jury having returned a verdict for the plaintiff herein, the court renders judgment on the verdict [*or set out submission to and findings by the court*].

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant, —, the sum of — dollars [collectible without relief from valuation or appraisal laws].

It is further considered and adjudged by the court that the deed from the defendant, —, to the defendant, —, was executed with the fraudulent intent to cheat, hinder, and defraud the creditors of said —, including the plaintiff, and that said deed is fraudulent and void as to the plaintiff, and subject to sale for the satisfaction of this judgment.

It is further considered and adjudged that [execution first issue on this judgment against the property of the defendant, —, and in case the amount due the plaintiff can not be made out of the property of said defendant that] the property conveyed to the defendant—to wit: [*describe the real estate*], or so much thereof as may be necessary to satisfy plaintiff's claim and costs, be sold as other lands are sold on execution, and the proceeds of the sale be applied to the payment of the

plaintiff's claim and costs, and that the balance, if any, be paid to the defendant, —.

[*Or, if there are several creditors, say: and that he bring the proceeds of said sale into court, to be disposed of according to law.*]

It is further considered and adjudged that the plaintiff recover of the defendants his costs and charges in this cause laid out and expended.

1. Can not be tried by jury, if objected to. The above form gives a judgment on the verdict of a jury. This is proper, so far as the personal judgment is concerned, and also as to the action to set aside the conveyance, if consented to. But if either party objects to a trial by jury, as to the character of the conveyance, it is error for the court to submit the question to the jury. The court *may* submit questions of fact in this class of cases to a jury for its own information, but the court is not bound by such findings. Ante, vol. 1, §§ 823-827; *Hendricks v. Frank*, 86 Ind. 278; *Evans v. Nealis*, 87 Ind. 262; *Lake Erie, etc., Ry. Co. v. Griffin*, 92 Ind. 487; *Lake v. Lake*, 99 Ind. 339.

See COMPLAINT, p. 153; EXECUTION, vol. 2, § 1150.

HABEAS CORPUS.

660.—Discharging prisoner from custody

— }
v. } Judgment.

Come the parties, and this cause is submitted to the court for trial without the intervention of a jury, and the court having heard the evidence, and being fully advised in the premises, finds for the plaintiff that he is unlawfully restrained of his liberty, as charged in the petition, and is entitled to be discharged.

It is therefore considered and adjudged by the court that the defendant unlawfully restrains the petitioner of his liberty, and that he be discharged from defendant's custody.

[It is further considered and adjudged that the petitioner recover of the defendant his costs and charges in this cause laid out and expended.]

661.—Remanding prisoner to custody of officer.

— }
v. } Judgment.

Come the parties, and this cause being submitted to the court for hearing, and the court having heard the evidence, and being sufficiently advised in the premises, finds for the defendant that the petitioner is

lawfully in his custody as sheriff of the county of —— [and not entitled to bail].

It is therefore considered and adjudged by the court that the petitioner be remanded to the custody of the defendant as such sheriff [without bail].

662.—For custody of infant.

—— }
v. } Judgment.

Come the parties and ——, named in the petition herein, and this cause is submitted to the court for trial without a jury, and the court having heard the evidence, and being sufficiently advised in the premises, finds that the petitioner is the father [mother] [guardian] of said ——, who is an infant, and is entitled to his [her] custody, and that the defendant unlawfully restrains said —— of his [her] liberty.

It is therefore considered and adjudged by the court that the said —— be discharged from the custody of the defendant, and that the custody of said —— be awarded to the petitioner [until the further order of this court], and that the petitioner recover of the defendant his [her] costs and charges in this cause laid out and expended.

See COMPLAINT, p. 161 ; ANSWER, p. 370.

INJUNCTION.

663.—General form.

—— }
v. } Judgment.

[Set out submission and findings as in other cases.]

It is therefore considered and adjudged by the court that the defendant be and he is hereby perpetually enjoined from [state what, as alleged in the complaint].

[Judgment for costs as in other cases.]

See vol. 2, §§ 1435-1445 ; COMPLAINT, p. 167 ; INJUNCTION, p. 456.

LIENS.

664.—On mechanic's lien.

—— }
v. } Judgment.

Come the parties, and this cause being submitted to the court for trial without the intervention of a jury, and the court having heard

the evidence, and being sufficiently advised in the premises, finds that there is due the plaintiff from the defendant the sum of — dollars, for which he is entitled to judgment, and that said sum is a lien on the real estate of the defendant, hereinafter described.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, together with his costs and charges in this cause laid out and expended.

It is further considered and adjudged by the court that the real estate described in plaintiff's complaint, to wit: [*describe particularly*], or so much thereof as may be necessary for the purpose, be sold by the sheriff as other lands are sold on execution, and the proceeds applied to the payment of plaintiff's claim and costs, and that the balance, after paying said claim and costs, be paid to the defendant.

[*Or, if there are several lien-holders, say:* and that the proceeds of said sale be applied, first, to the payment of the costs of this action, and then to the payment of the claims of the several claimants herein, and if said proceeds be insufficient to pay all of said claims in full, that the same be applied thereon *pro rata*.]

[*Or, if the property has been transferred, enter personal judgment against the defendant personally liable, and add:* It is further considered and adjudged that the real estate described in the complaint, to wit: [*describe it*] is subject, in the hands of the defendant, —, to plaintiff's lien, and that said defendant pay into this court said sum of — dollars, adjudged to be due the plaintiff, within — days, upon default of which it is considered and adjudged that said real estate be sold as other lands are sold on execution, etc. [*proceed as above*.]

See COMPLAINT, p. 203 ; ANSWER, p. 384 ; ante, vol. 1, §§ 298–302.

665.—Of vendor's lien.

— }
v. } Judgment.

Come the parties, and this cause being submitted to the court without the intervention of a jury, and the court having heard the evidence, and being sufficiently advised in the premises, finds that the defendant, —, is indebted to the plaintiff in the sum of — dollars, for which he is entitled to judgment, and that said indebtedness is for the purchase-money of the real estate hereinafter described, and is a lien thereon in the hands of the defendant, —.

It is therefore considered and adjudged that the plaintiff recover of

the defendant, —, said sum of — dollars [collectible without relief from valuation and appraisement laws].

It is further considered and adjudged that the plaintiff recover of the defendants his costs and charges in this cause laid out and expended.

It is further considered and adjudged that [execution first issue herein against the property of the defendant, —, and in case sufficient can not be realized therefrom to pay and satisfy plaintiff's claim and costs, that] the real estate described in the complaint, to wit: [*describe it particularly*], or so much thereof as may be necessary for that purpose, be sold by the sheriff as other lands are sold on execution, and the proceeds be applied to the payment of plaintiff's claim and costs, and the balance remaining, if any, be paid to the defendant, —.

1. Form of judgment. If the complaint alleges and the court finds that the defendant personally liable for the debt has no property subject to execution, the judgment may order a sale of the property, in the hands of a subsequent purchaser, in the first instance. If not, execution must be ordered against the property of the defendant personally liable, and a sale of the property decreed, only upon the failure to realize the debt from him. So the personal property must be exhausted before resorting to the real estate in the hands of the person primarily liable, and the judgment must so order, unless it is alleged and proved that he has not personal property sufficient to satisfy the claim. Ante, vol. 1, § 1010; vol. 3, p. 207, note.

MANDAMUS.

666.—General form.

— }
v. } Judgment.
— }

[*Set out submission, etc.*]

It is therefore considered and adjudged that a peremptory writ of mandate issue out of and under the seal of this court to the defendant, commanding him to [*state what, as prayed for in the complaint*].

[*Judgment for costs as in other cases.*]

See vol. 2, § 1450; vol. 3, pp. 218, 383

MORTGAGES.

667.—General form.

— } Judgment.
 v. }
 — }

Comes the plaintiff, and it appearing to the satisfaction of the court by the sheriff's return to the summons, which summons, and the return of the sheriff indorsed thereon, are in the words and figures following, to wit: [*here insert*]; that the defendant, —, has been duly served with process more than ten (10) days before the first day of the present term of this court.

And it further appearing to the satisfaction of the court, by the proof of the publication of the notice filed in this cause, which proof of publication reads as follows, to wit: [*here insert*]; that the defendant, —, has been duly notified of the filing and pendency this action by three successive weekly publications in the —, a newspaper of general circulation, printed and published in the English language in the city of —, county of —, and State of Indiana, the last of which publications was made more than thirty days before the first day of the present term of this court.

And the said defendants, — and —, failing to appear, and being now three times loudly called, come not, but herein wholly make default, this cause is submitted to the court for trial upon the default of the defendants, — and —, and the issues joined by the defendant, —, without the intervention of a jury, and the evidence being heard, and the court being fully advised in the premises, finds [*setting it out*].

It is therefore considered and adjudged by the court that the plaintiff recover of the defendants, — and —, the sum of — dollars and — cents, his damages assessed by the court, as aforesaid, and also his costs and charges in this behalf laid out and expended, taxed at — dollars, without any relief whatever from valuation laws. [The judgment to bear interest at the rate of eight per cent per annum from the rendition thereof until paid.]

And it is further considered and adjudged by the court that the equity of redemption of the defendants, — and —, and all persons claiming from, under, or through them in and to said mortgaged premises, to wit: [*describe it*], be, and the same is hereby forever barred and foreclosed, and that the real estate hereinbefore described, and all the right, title, interest, and claim of the defendants, — and —, and of all persons claiming from, under, or through them in and to the same, or so much thereof as may be necessary for

that purpose, shall be sold by the sheriff of the county of —, in the State of Indiana, as other lands are sold on execution, such sale to be made without any relief whatever from valuation laws; and the proceeds arising from such sale the sheriff is ordered and directed to apply in the manner following, to wit: First. To the payment of all costs accrued in this cause. Second. To the payment [*specify*]. The overplus, if any, remaining after payment of the foregoing judgment, interest, and costs, to be paid by the sheriff to the clerk of this court for the use of the party lawfully authorized to receive the same; and in the event said mortgaged premises shall fail to sell for a sum sufficient to pay and satisfy said judgment, principal, interest, and costs, the residue thereof remaining unpaid shall be levied of the goods and chattels, lands and tenements of the defendants, — and —, subject to execution, (and sale thereof shall be made without any relief whatever from valuation laws.)

668.—Installments not due—Property not susceptible of division.

— }
v. } Judgment.

[*Show service and default, or submission and trial, as above, and continue:*] And the court finds that there is now due the plaintiff upon the first note described in the complaint the sum of — dollars, principal and interest, in all — dollars.

That the second note, amounting to the sum of — dollars, including interest, will be due on the — day of —, 18—.

That the third note, amounting to — dollars, including interest, will become due on the — day of —, 18—.

The court further finds that the real estate described in the complaint is not susceptible of division.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars now due, together with his costs and charges in this cause laid out and expended.

It is further considered and adjudged by the court that upon failure of defendant to pay said sum and costs before the day fixed for the sale, the whole of the real estate described in the complaint, to wit: [*describe it*] be sold as other lands are sold on execution, and the proceeds applied as follows:

1. To the payment of the costs.
2. To the payment of said sum of — dollars, now due, and interest thereon.

3. To the payment of the amounts not yet due, in their order, deducting from the amount found above the interest from the day of sale until the maturity of said notes respectively.

4. Any balance remaining to be paid to defendant.

It is further considered and adjudged that if the defendant shall pay the sum now due, with interest and costs of suit, before sale of said real estate, then proceedings shall cease until another installment of said indebtedness shall mature, and upon a failure to pay either of said installments an order of sale shall issue on this judgment, as above adjudged, and sale be made of the said real estate for the satisfaction of the whole amount yet unpaid, with interest and costs, deducting interest, as above provided, from any installment not yet due. But if, at any time before sale, the defendant shall pay the amount then due, with interest and costs, proceedings shall be stayed until the next installment shall fall due, when an order of sale shall issue on this judgment, and proceedings and sale be had, as above adjudged, until the whole of plaintiff's claim and costs shall be collected.

669.—Installments not due—Real estate divisible.

— }
v. } Judgment.
— }

[*Submission and findings as in preceding forms, omitting the finding that property is not susceptible of division.*]

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant said sum of — dollars, now due, together with his costs and charges in this cause laid out and expended, and — dollars, his reasonable attorney's fees.

It is further considered and adjudged that the mortgaged premises, to wit: [*describe them*], or so much thereof as may be necessary to pay and satisfy said sum of — dollars, now due, with costs and attorney's fees, be sold as other lands are sold on execution, without relief from valuation or appraisement laws, for the satisfaction of said sum and costs and attorney's fees; but if, before said sale, the defendant shall pay said sum, now due, with interest, costs, and attorney's fees, or in case the same is satisfied by a sale of a part of the premises mortgaged, then proceedings shall be stayed thereon until default shall be made in the payment of the next installment, when, upon a certified copy of this judgment, the sheriff shall proceed to sell said mortgaged premises [unsold], or so much thereof as shall be necessary to satisfy said second installment, to become due on the — day of —, 18—, and all costs. But if the defendant shall pay said second in-

stallment and interest and costs, or the same shall be satisfied by a sale of a part of the mortgaged premises, then proceedings shall be stayed until default in the payment of the last installment, and said last installment shall be collected when due by sale of the mortgaged premises remaining unsold, as above adjudged, in case of the second installment, and the proceeds of any sale made under this judgment shall be applied, first, to the payment of costs, then to the sum then due, and any surplus to the installment next to become due until the whole sum secured by said mortgage is paid and satisfied; and if any of the proceeds of the sale remain after payment of plaintiff's claim, interest, costs, and attorney's fees. the same to be paid to the defendant.

1. Form of judgment in foreclosure. Ante, vol. 1, § 1009; *Firestone v. The State*, 100 Ind. 226.

2. Effect of foreclosure—Who bound by judgment. Ante, vol. 1, §§ 135-149, 1009; *Ulrich v. Drischell*, 88 Ind. 354; *Woodworth v. Zimmerman*, 92 Ind. 349; *Masters v. Templeton*, 92 Ind. 447; *Travelers' Ins. Co. v. Patten*, 98 Ind. 209; *Shirk v. Andrews*, 92 Ind. 509; *Randall v. Lower*, 98 Ind. 255; *Curtis v. Gooding*, 99 Ind. 45; *Catterlin v. Armstrong*, 79 Ind. 514; *Stockwell v. The State*, 101 Ind. 1; *Pauley v. Cauthorn*, 101 Ind. 91; *Gordon v. Lee*, 102 Ind. 125.

3. Who entitled to surplus of proceeds of sale. *Firestone v. The State*, 100 Ind. 226.

4. Subsequent purchaser—How order of sale should be made. Ante, vol. 1, § 1009; *Henderson v. Truitt*, 95 Ind. 309; *Merritt v. Richey*, 97 Ind. 236.

670.—Indemnifying mortgage.

— }
v. } Judgment.
— }

[*Submission and trial or notice and default as in other cases.*]

And the court having heard the evidence, and being advised in the premises, finds that the mortgage set out in plaintiff's complaint was given to indemnify plaintiff against loss as [*state what, e. g.*] surety for defendant on the note to —, described in said mortgage, and that plaintiff has been compelled to pay said note, amounting to the sum of — dollars [*or, and defendant promised and agreed in said mortgage to pay said note, but failed so to do, and the same is now due and unpaid*].

[It is therefore considered and adjudged that the plaintiff recover of the defendant said sum of — dollars, together with his costs in this cause laid out and expended].

It is further considered and adjudged that the real estate described in said mortgage, or enough thereof to pay and satisfy said note, and

the costs of this action and accruing costs, be sold as other lands are sold on execution, and the proceeds applied to the payment of the costs of this action and the amount due the plaintiff, and the residue, if any, to the defendant [*or if the plaintiff has not paid the debt for which he is surety, say*: and that the proceeds of said sale be applied, first, to the payment of the costs of this action and accruing costs, and the residue, if any, paid into this court for the use of the parties entitled to receive the same, as may be ordered by this court], and that the residue of this judgment remaining unpaid after the sale of said property, if any, be levied of any other property of the defendant subject to execution.

1. Who may foreclose indemnifying mortgage, and when. Ante, vol. 2, § 1417; vol. 3, pp. 72, 284.

PARTITION.

671.—Interlocutory decree.

 } Interlocutory Decree.
v. }

Come the parties, and this cause is submitted to the court for trial, without the intervention of a jury, and the court having heard the evidence, and being sufficiently advised in the premises, finds that the parties hereto are the owners of the real estate described in the complaint, and have interests therein and liens thereon as follows:

1. The plaintiffs are each the owners in fee-simple, subject to the life estate of the defendant, —, in said real estate, of one undivided — thereof.

2. The defendant, —, is the owner of one undivided third of said real estate for and during her natural life.

3. That the other defendants are the owners of one undivided — of said real estate each, subject to the life estate of the defendant, —, therein.

4. That the defendant, —, holds a mortgage given by the defendant, —, on his undivided interest in said real estate, which is a lien on his said interest.

5. That the defendant, —, on the — day of —, 18—, recovered a judgment in the — Circuit Court against the defendant, —, for — dollars, which is unpaid and a lien upon his interest in said real estate.

6. That the parties are entitled to have said real estate partitioned and set apart to them in severalty in the proportions above stated.

It is therefore considered, adjudged, and decreed by the court that

partition be made of said real estate, to wit: [*describe it*] among the parties according to their respective interests, as above found, by setting off to the plaintiffs the one — of said real estate each, and the defendant, —, one-third thereof, to be held by her during her natural life, and to the other defendants one — of said real estate each [*or, if asked for by any of the parties, that their interest be set off jointly in one body*].

It is further considered and adjudged that the defendant, —, pay of the costs of this proceeding one — part thereof, and that the balance of the costs be paid by the plaintiffs and defendants in proportion to the amount of said real estate, in value, set off to each of them.

It is further considered and adjudged that the mortgage of the defendant, —, be transferred to and made a lien upon that part of said real estate set off to the defendant, —, in severalty, and that the other owners of said real estate hold the interests set off to them free from the lien of said mortgage, and that the lien of the judgment of the defendant, —, be transferred to and made a lien on the interest of the defendant, —, set off to him in severalty, and that the other owners take their several interests free from the lien of said judgment.

It is further considered, adjudged, and decreed that —, —, and — be, and they are hereby appointed commissioners to make partition of said real estate, in accordance with this decree, and that they make report of their proceedings at the present [next] term of this court.

672.—Final judgment—Confirmation of report of commissioners.

— }
v. } Final Judgment of Partition.
— }

Come the parties, and —, —, and —, heretofore appointed commissioners to make partition herein, also come and make and acknowledge in open court their report, as follows: [*copy report*], which report is by the court approved.

It is therefore considered and adjudged that said report of the commissioners be and the same is hereby confirmed, and that the partition made thereby be and the same is hereby made firm and effectual, and that the parties to whom said real estate is set off hereafter hold and occupy the parts set off to each of them respectively in severalty.

It is further ordered and adjudged that said commissioners be allowed the sum of — dollars each for their services, to be paid by the parties as provided by the interlocutory decree herein.

673.—Judgment ordering sale of property.

v.	}	Judgment.
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[*Submission as in other cases, and the finding of the interests of the parties as in Form 671.*]

And the court further finds from the evidence that the real estate described, in the complaint can not be divided and the shares of the several parties be set off to them without damage to the real estate and the interest of the parties [*or, the commissioners heretofore appointed make and acknowledge in open court their report as follows: (here insert report), by which it appears that said real estate can not be divided and set off to the parties without damage to the real estate and the parties, and said report is approved and confirmed*].

It is therefore considered and adjudged by the court that said real estate, to wit: [*describe it*], be appraised, as provided by law, and sold at public sale on the premises [*or state other place*] as other lands are sold by the sheriff on execution, and with like notice, for not less than two-thirds of its appraised value [*or state other terms of sale, e. g., at private sale, at not less than its appraised value*], for one-third cash in hand, one-third in one, and one-third in two years from the day of sale, the purchaser to secure the deferred payments by notes drawing — per cent interest from date, with good and sufficient personal security, and that out of the proceeds of said sale the costs of this action and of the sale be first paid, and that the balance be paid to the parties to this action, in proportions equal to their several interests in said real estate, as above set out.

It is further considered and adjudged that — be and he is hereby appointed commissioner to make sale of said real estate, and that he give bond in the sum of — dollars, with surety to the approval of this court, and that he be allowed the sum of — dollars for his services as such commissioner, to be deducted from the purchase-money [*one-third thereof to be taken from each payment*], and to be included as a part of the costs of sale.

It is further considered and adjudged that upon the sale of said real estate said commissioner issue to the purchaser a certificate of purchase thereof, and that upon the full payment of the purchase-money he execute to said purchaser a deed therefor, and report the same to this court for approval, together with a report of his doings in the premises.

1. Sale, when may be ordered. R. S. 1881, §§ 1189, 1199; ante, vol. 2, § 1463.

2. Practice generally. R. S. 1881, §§ 1186-1209; ante, vol. 1, §§ 138, 139, 157-159; vol. 2, §§ 1456-1466; vol. 3, pp. 258-261, 387.

3. Purchaser, when entitled to possession, *Stout v. McPheeters*, 84 Ind. 585; *Deputy v. Mooney*, 97 Ind. 463.

4. Effect of judgment on title of parties. Ante, p. 259, note 4.

5. Effect of on liens. *Quick v. Brenner*, 101 Ind. 230.

6. Resale, when may be ordered. *Rout v. King*, 103 Ind. 555.

For further forms in proceedings for partition, see COMPLAINT, p. 258; ANSWER, p. 387; PARTITION, p. 626.

PARTNERSHIP.

674.—Judgment of dissolution and accounting.

— }
v. } Judgment.
— }

[*Submission as in other cases.*]

And the court having heard the evidence, and being fully advised in the premises, finds for the plaintiff that the allegations of the complaint are true; that plaintiff is entitled to a dissolution of the partnership existing between him and the defendant and to an accounting, and that there is due the plaintiff from defendant upon an accounting of said partnership business the sum of — dollars.

It is therefore considered and adjudged by the court that the partnership existing between plaintiff and defendant be and the same is hereby dissolved, and that the plaintiff recover of the defendant the sum of — dollars, together with his costs and charges in this behalf laid out and expended.

1. When partner may enforce a dissolution and recover balance. Ante, pp. 261-264.

PRINCIPAL AND SURETY.

675.—Judgment on cross-complaint of suretyship.

— }
v. } Judgment.
— }

[*Submission as in other cases.*]

And the court finds that there is due from the defendants to the plaintiff on the — sued on the sum of — dollars, collectible without relief from valuation or appraisement laws.

The court further finds that the defendant, —, executed the —

sued on as the surety of the defendant, —, and that the property of said defendant, —, should be first levied upon and exhausted before levying on the property of the defendant, —.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendants said sum of — dollars, together with his costs and charges in this cause laid out and expended, collectible without relief from valuation or appraisement laws.

It is further considered and adjudged by the court that execution be first levied of the property of the defendant, —, and that his property subject to execution be exhausted before levying upon the property of the defendant, —,

1. When surety entitled to judgment for sale of property of principal first. Ante, vol. 2, §§ 1152, 1474, 1475; *Leaman v. Sample*, 91 Ind. 236; *Menaugh v. Chandler*, 89 Ind. 94; *Baldwin v. Fleming*, 90 Ind. 177.

See COMPLAINT, p. 265; ANSWER, p. 391.

QUIETING TITLE.

676.—General form.

— }
v. } Judgment.

[*Submission.*]

And the court having heard the evidence, and being advised in the premises, finds that the plaintiff is the owner in fee-simple of the real estate described in the complaint; that the defendant claims an interest therein adverse to the plaintiff; that his claim is without right and unfounded, and that plaintiff is entitled to have his title thereto quieted.

It is therefore considered and adjudged by the court that the plaintiff is the owner [in fee-simple] of the real estate described in the complaint, to wit: [*describe it*], and that the defendant's claim thereto is without right and unfounded, and that plaintiff's title thereto be and the same is hereby quieted.

It is further considered and adjudged that plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See COMPLAINT, p. 267.

INFORMATION—QUO WARRANTO.

677.—Forfeiture of corporate franchise.

— }
 v. } Judgment.
 — }

Come the parties, and this cause being submitted to the court for trial without the intervention of a jury, and the court having heard the evidence and being fully advised in the premises, finds for the plaintiff that the allegations of the information herein are true; that the defendant was, on the — day of —, 18—, duly organized as a corporation under the general laws of the State of Indiana, and has ever since been, and is now, acting as such corporation under the name of —.

That the defendant has continuously, since its incorporation, misused its corporate authority, franchises, and privileges, and offended against the laws of the state, in this: [*state the particulars in which it has violated its charter*].

It is therefore considered and adjudged by the court that the franchise of the defendant as such corporation be and the same is forever forfeited.

It is further considered and adjudged by the court that the plaintiff recover of the defendant his [its] costs and charges in this cause laid out and expended.

See COMPLAINT, p. 270.

678.—Ouster from office.

— }
 v. } Judgment.
 — }

[*Submission.*]

And the court having heard the evidence, and being sufficiently advised in the premises, finds that the allegations of the information are true; that [the relator] — was, on the — day of —, 18—, duly elected to the office of — for the term of — years from the — day of —, 18—; has been duly commissioned and has qualified as such, and has been, since the — day of —, 18—, entitled to have and hold said office and receive the fees and emoluments thereof; that the defendant, on the — day of —, 18—, usurped said office, and has ever since held the same without right, and has received the fees and emoluments thereof, amounting to the sum of — dollars, which he has converted to his own use, and

has, during said time, wrongfully and unlawfully kept said [relator] — out of said office, and deprived him of said fees and emoluments.

It is therefore considered and adjudged by the court that the defendant be ousted from said office, and that he deliver the same and turn over and deliver all books and papers and appurtenances thereunto belonging to the [relator] — forthwith.

It is further considered and adjudged that the plaintiff recover [for the use of the relator] said sum of — dollars, together with the costs and charges in this cause laid out and expended.

See COMPLAINT, pp. 268, 269.

679.—Against parties assuming to act as a corporation.

— }
v. } Judgment.
— }

[Submission.]

And the court having heard the evidence, and being sufficiently advised in the premises, finds that the allegations of the information herein are true; that the defendants are unlawfully and wrongfully assuming to act as a corporation, by the name of —, without having been incorporated as such.

It is therefore considered and adjudged by the court that the defendants are not a corporation; that they are wrongfully and unlawfully assuming to be, act, and contract, as a corporation, under the name of —, and that they be and they are hereby ousted and forbidden to act as such corporation, or to use the name, franchise, or privileges thereof.

It is further considered and adjudged that the plaintiff recover of the defendants its costs and charges in this cause laid out and expended.

See COMPLAINT, p. 269; ANSWER, p. 395.

REFORMATION.

680.—Correcting mistake in deed.

— }
v. } Judgment.
— }

[Submission.]

And the court having heard the evidence, and being sufficiently advised in the premises, finds for the plaintiff; that the allegations of his complaint are true; that on the — day of —, 18—, defendant,

for a valuable consideration, sold and agreed to convey to plaintiff the following real estate in the county of —, State of Indiana: [*describe it*], and executed to plaintiff the deed mentioned in plaintiff's complaint, intending thereby to convey to plaintiff said real estate, but by the mutual mistake of the parties the following description was inserted in said deed instead of the correct one, to wit: [*give false description*], [*or, by the mutual mistake of the parties said real estate was described in said deed as the north-west quarter of section —, town —, range —, instead of the north-east quarter of said section, as was intended by the parties*], [*or state clearly in what the mistake consists*], and that the plaintiff is entitled to have said mistake corrected, and said deed reformed, by striking out said erroneous description and inserting the correct description of said real estate.

It is therefore considered and adjudged by the court that the deed from defendant to plaintiff mentioned in the complaint be and the same is hereby corrected and reformed by striking therefrom said false and erroneous description, and inserting in lieu thereof the true and correct description, as follows: [*set out the correct description*], [*or, by striking out of the description in said deed the word west where the same occurs in describing the quarter section of said real estate, and inserting in lieu thereof the word east, so as to make said description read as follows: (set out description as corrected)*], and that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See ante, vol. 1, §§ 390, 593; vol. 2, § 1410; vol. 3, pp. 228, 276.

REPLEVIN.

681.—For plaintiff.

<div style="border-top: 1px solid black; width: 50px; margin: 0 auto;"></div> <div style="border-bottom: 1px solid black; width: 50px; margin: 0 auto;"></div>	}	Judgment.
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Come the parties, and the jury having returned their verdict herein in favor of the plaintiff, the court renders judgment thereon.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the property described in the complaint, to wit: [*describe it*]; that said property is of the value of — dollars, and that the defendant unlawfully detains the same from plaintiff.

It is further considered and adjudged by the court that upon failure of the defendant to deliver up to the plaintiff said property the plaintiff recover of the defendant said sum of — dollars.

It is further considered and adjudged that plaintiff recover of de-

fendant — dollars, his damages for the detention of said property, together with his costs and charges in this cause laid out and expended.

682.—For defendant for return of property.

— }
v. } Judgment.
— }

[*Submission and findings or return of verdict.*]

It is therefore considered and adjudged by the court that the defendant have return of the property described in the complaint, to wit: [*describe it*], or, upon failure of the plaintiff to return the same, that he recover of the plaintiff the sum of — dollars, found [by the jury] to be the value thereof, and that defendant recover of plaintiff his costs in this cause laid out and expended.

1. Form of judgment in replevin. Ante, vol. 2, §§ 1507, 1508; vol. 3, pp. 277, 430; *Thomas v. Irwin*, 90 Ind. 557; *Foster v. Bringham*, 99 Ind. 505.

2. Effect of judgment. *Smith v. Lisher*, 23 Ind. 500; *Denny v. Reynolds*, 24 Ind. 248; *Carr v. Ellis*, 37 Ind. 465; *Landers v. George*, 49 Ind. 309; *Smith v. Mosby*, 98 Ind. 445; ante, pp. 116–118.

RESCISSION AND CANCELLATION.

683.—General form.

— }
v. } Judgment.
— }

[*Submission.*]

And the court having heard the evidence, and being sufficiently advised in the premises, finds for the plaintiff that the allegations of the complaint are true; that the — mentioned in the complaint was executed by plaintiff [without consideration] and was procured by the fraudulent representations of defendant, as set out in the complaint [that plaintiff received as consideration therefor the sum of — dollars, which sum and interest thereon he tendered to defendant before the bringing of this action, and has brought the same into court for the use of the defendant].

It is therefore considered and adjudged by the court that the contract under which said — was executed by plaintiff be and the same is hereby rescinded; that said — be and the same is hereby canceled and declared void; and that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See COMPLAINT, p. 279.

SPECIFIC PERFORMANCE.

684.—General form.

— }
 v. } Judgment.
 — }

[*Submission.*]

And the court having heard the evidence, and being fully advised in the premises, finds that on the — day of —, 18—, plaintiff purchased from the defendant, for a valuable consideration, the real estate described in the complaint, paid him the consideration therefor in full, and took possession thereof under his purchase; and defendant, in consideration thereof, promised and agreed to execute to plaintiff a good and sufficient warranty deed for said real estate on or before the — day of —, 18—, which he has failed and refused, on demand of plaintiff, to do.

It is therefore considered and adjudged by the court that the defendant execute to plaintiff a good and sufficient warranty deed for said real estate, to wit: [*describe it*], and that upon his failure for — days to execute said deed that — be and he is hereby appointed a commissioner to convey said real estate to the plaintiff, and he is hereby ordered, upon failure of defendant to comply with this judgment, to execute a deed for said real estate to the plaintiff, which deed, when executed by him, shall vest in the plaintiff all of the right, title, or interest of the defendant in and to said real estate.

It is further considered and adjudged by the court that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See COMPLAINT, p. 297.

SUBROGATION.

685.—Of surety to rights of creditor.

— }
 v. } Judgment.
 — }

[*Submission.*]

And the court having heard the evidence, and being sufficiently advised in the premises, finds for the plaintiff that the allegations of his complaint are true; that on the — day of —, 18—, he became surety for defendant, —, on a promissory note for the sum of — dollars to the defendant, —; that the defendant, —, executed to

the defendant, —, as additional security for the payment of said note the mortgage set out in plaintiff's complaint; that on the — day of —, 18—, plaintiff, as such surety, was compelled to, and did, pay said note to the defendant, —, amounting, with the interest, to — dollars; that the defendant, —, still holds said mortgage, and the defendant, —, is still the owner of the real estate therein described.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant, —, the sum of — dollars; that he be subrogated, in all things, to the rights of the defendant, —, in said mortgage; that said real estate, to wit: [*describe it*] be sold as other lands are sold on execution [without relief from valuation or appraisal laws], and the proceeds thereof be applied to the payment of plaintiff's claim and costs, and the balance, if any, be paid to the defendant, —, and that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See COMPLAINT, pp. 266, 306, 307.

TRUSTS.

686.—Declaring trust and ordering a conveyance.

v.	}	Judgment.
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[*Submission.*]

And the court having heard the evidence, and being sufficiently advised in the premises, finds for the plaintiff that the allegations of his complaint are true; that the defendant purchased the real estate described in the complaint with the money of the plaintiff, and took the deed therefor in his own name without plaintiff's knowledge or consent [*or, upon the agreement that he was to take the conveyance therefor in his own name and convey the same to plaintiff on demand*], and plaintiff has demanded a conveyance thereof from the defendant, before bringing this action, but he has failed and refused to execute the same.

It is therefore considered and adjudged by the court that the defendant holds the title to said real estate, to wit: [*describe it*], in trust for the plaintiff; that he execute to plaintiff a good and sufficient [*warranty*] deed therefor; and that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

It is further considered and adjudged by the court that if the de-

fendant shall fail for — days to execute said deed — be and he is hereby appointed to make said conveyance, and that he execute to plaintiff a deed therefor, which shall vest in him all of the right, title, and interest of the defendant in and to said real estate.

See COMPLAINT, p. 312.

WILLS.

687.—Declaring will invalid and setting aside probate.

v.	}	Judgment.
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[*Submission or verdict of jury.*]

And the court having heard the evidence, and being sufficiently advised in the premises, finds for the plaintiff that the allegations of his complaint are true; that at the time the will mentioned in the complaint was attempted to be executed the said — was of unsound mind and incapable of executing the same [*or, the will mentioned in the complaint was unduly executed [or, if tried by a jury, say: the jury having returned their verdict for the plaintiff herein, the court renders judgment on the verdict].*]

It is therefore considered and adjudged by the court that the pretended will of said —, mentioned in the complaint, is invalid, and not his will, and that the probate thereof be and the same is hereby set aside.

It is further considered and adjudged by the court that the plaintiff recover of the defendant his costs and charges in this cause laid out and expended.

See COMPLAINT, p. 318.

APPEALS.

SECTION CXV.

EXCEPTIONS.

688.—Skeleton bill of exceptions.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Bill of Exceptions.
— }

Be it remembered that on the — day of —, 18—, it being the — juridical day of the — term, 18—, of said court, the following pleas and proceedings were had in said cause before the Hon. —, sole judge of said court.

1. *Motion to dismiss action.*

The defendant moved the court to dismiss the action on the following grounds: [*state them*], [*or*, which motion was as follows: (*here insert motion*)], which motion was submitted to the court and sustained [overruled], to which plaintiff [defendant] at the time excepted.

2. *Motion to dismiss appeal.*

That afterward, on the — day of —, 18—, it being the — juridical day of said term of said court, the plaintiff [defendant] moved the court to dismiss the appeal from the justice in this cause on the following grounds: [*state them*], [*or*, which motion was as follows: (*insert it*)], which motion was submitted to the court and sustained and the appeal dismissed [overruled], to which the plaintiff [defendant] at the time excepted.

3. *Motion to strike out paragraphs of pleading.*

That on the — day of —, 18—, it being the — juridical day of said term, the plaintiff filed his motion to strike out the — paragraph of the defendant's answer, as follows: [*here insert motion*], and on the — juridical day of said court said motion was submitted to the court and overruled [sustained], to which the plaintiff [defendant] at the time excepted.

4. *Motion to suppress depositions.*

That afterward, on the — day of —, 18—, it being the — juridical day of said term [the — term, 18—] of said court, the plaintiff [defendant] filed his motion to suppress the depositions of — and —, and parts of the depositions of — and —, taken on behalf of the defendant [plaintiff], which motion was as follows: [*here insert motion*], and said motion was [on the — juridical day of said term] submitted to the court and overruled as to the deposition of said —, to which the plaintiff [defendant] at the time excepted, and sustained as to the deposition of said —, to which the defendant [plaintiff] at the time excepted, and sustained as to the following parts of the depositions of — and — [*set out the parts to which the motion was sustained*], to which the plaintiff [defendant] at the time excepted, and overruled as to the following parts of said depositions: [*set out the parts*], to which the plaintiff [defendant] at the time excepted.

5. *Motion to require attorney to show authority.*

That on the — day of —, 18—, it being the — juridical day of the — term of said court, the plaintiff moved the court to require —, who appeared in this cause as attorney for defendant, to show by what authority he appeared as such attorney, and in support of said motion filed and submitted the following affidavit: [*copy it*], and said motion was overruled, to which the plaintiff at the time excepted [or, and said — filed and submitted the following affidavit as showing his authority to so appear: (*copy it*), and plaintiff objected to his further appearing in said cause on the grounds (*state them, e. g.*) that said affidavit was not sufficient to show any authority on his part to appear as attorney for defendant, which objection was overruled and said — allowed to continue to act as such attorney, to which the plaintiff at the time excepted].

6. *Motion to set aside default.*

That on the — day of —, 18—, it being the — juridical day of said term [the — term, 18—] of said court, the defendant moved the court to set aside the default taken against him herein as follows: [*copy motion*], and in support of said motion filed and submitted the following affidavits: [*copy them.*] And the plaintiff filed and submitted the following affidavits in opposition to said motion: [*copy them*], and said motion was submitted to the court and overruled [*sustained*], to which the defendant [plaintiff] at the time excepted.

7. *Motion to make new parties.*

That on the — day of —, 18—, it being the — juridical day of said term [the — term, 18—] of said court, the defendant moved the court to make — and — parties to this action as plaintiffs [defendants] on the following grounds: [*state them*], [*or, which motion was as follows: (copy it)*], and in support of said motion filed and submitted the following affidavit: (*copy it*), which motion was submitted to the court and overruled [*sustained and said — and — ordered to be made parties*], to which the defendant [plaintiff] at the time excepted.

8. *Motion for change of venue.*

That on the — day of —, 18—, it being the — juridical day of said term [the — term, 18—] of said court, the plaintiff [defendant] moved the court for a change of venue, and in support of his motion filed and submitted the following affidavit: [*copy it*], and the court overruled [*sustained*] said motion [and granted a change of venue] [on the ground that the motion came too late under the rule of the court, which rule is as follows: (*copy it*)], to which the plaintiff [defendant] at the time excepted.

9. *Motion for a continuance.*

That on the — day of —, 18—, it being the — juridical day of the — term of said court, the plaintiff moved the court for a continuance of this cause, and in support of his motion filed and submitted the following affidavits: [*copy them*], which motion was overruled [*sustained and a continuance granted*], to which the plaintiff [defendant] at the time excepted.

10 *Challenge of juror.*

That on the — day of —, 18—, it being the — juridical day of the — term of said court, the following proceedings were had: The cause being called for trial, and while the jury was being impan-

eled, one — was called as a juror, and, together with other persons so called, was sworn to true answers make to such questions as might be propounded to him touching his competency to serve as a juror; and, in answer to questions propounded to him, testified as follows: [*set out his examination in full*], whereupon the plaintiff [defendant] challenged said juror for cause, on the following grounds: [*state them, e. g.*] that it appeared by his statements under said examination that he was incompetent to serve as a juror on account of his relationship to the defendant [plaintiff], but said challenge was overruled and said — allowed to serve as a juror, to which the plaintiff [defendant] at the time excepted.

11. *Incompetency of juror discovered after the jury was impaneled.*

That on the — day of —, 18—, it being the — juridical day of said term of said court, the following proceedings were had in said cause: One — was called as a juror to serve in said cause, and was, with other persons so called, sworn to true answers make as to his competency to serve as a juror in the cause; and, in answer to questions propounded to him, stated that he was not in any way related to either of the parties to the action, and that he had not formed or expressed an opinion in regard to the merits of the controversy between the parties; that he was accepted by the parties and sworn and acted as a juror in the trial of the cause; that it is assigned as one of the causes for a new trial herein that the said — was incompetent to serve on said jury on the grounds that he had both formed and expressed an opinion as to the merits of the controversy in this action, and was related to the defendant [plaintiff]; and in support of said motion the plaintiff [defendant] filed and submitted the following affidavits: [*copy them.*]

And the defendant [plaintiff] filed and submitted the following affidavits in support of said motion: [*copy them.*]

And the court overruled [sustained] said motion for a new trial [on said grounds], to which the plaintiff [defendant] at the time excepted.

12. *Misconduct of juror.*

That —, one of the jurors in this cause, was, with the other jurors, permitted to separate during the recess of the court during the trial, and one of the causes assigned for a new trial herein is that while so separated from the other jurors he was guilty of misconduct as follows: [*state the acts of misconduct, e. g.*] He went in company with the plaintiff [defendant] to the saloon of —, in the city of —, and was by the plaintiff [defendant] treated to intoxicating liquors, and

then and there became intoxicated and conversed with plaintiff [defendant] about the merits of the action; and in support of said cause, in the motion for a new trial plaintiff [defendant] filed and submitted the following affidavits: [*copy them.*]

And the defendant [plaintiff] filed and submitted the following affidavits in opposition to said motion: [*copy them.*]

And the court overruled [sustained] said motion, to which the plaintiff [defendant] at the time excepted.

13. *Amendment of pleading on the trial.*

That during the trial of this cause the plaintiff moved the court for leave to amend his complaint by [*state the proposed amendment*], to which the defendant objected, and the court sustained said motion and permitted plaintiff to make said amendment [overruled said motion and refused to allow said amendment to be made], to which the plaintiff [defendant] at the time excepted.

14. *Motion for a continuance on account of an amendment of a pleading during the trial.*

That during the trial of this cause the court permitted the plaintiff [defendant], over the objection of defendant [plaintiff], to amend his complaint [answer] by [*state what the amendment was*], whereupon the defendant [plaintiff] moved the court for a postponement of the trial, to enable him to prepare an answer [reply] to said complaint [answer] as amended, and in support of his motion filed and submitted the following affidavit: [*copy it.*]

And the court overruled [granted] said motion, to which the plaintiff [defendant] at the time excepted.

Whereupon the plaintiff [defendant] moved the court for a continuance until the next term of this court, and in support of his motion filed and submitted the following affidavits: [*copy them.*]

And the court overruled [sustained] said motion, and refused [granted] said continuance, to which the plaintiff [defendant] at the time excepted.

15. *Accident and surprise.*

That one of the causes assigned for a new trial in this cause was that the plaintiff [defendant] was by accident [surprise], which ordinary prudence could not have guarded against, prevented from having a fair trial; and in support of said reason for a new trial the plaintiff [defendant] filed and submitted the following affidavits: [*copy them.*]

And the defendant [plaintiff] filed and submitted the following affidavits in opposition thereto: [*copy them.*]

And plaintiff [defendant] filed and submitted the following affidavits in rebuttal: [*copy them.*]

And the court overruled [sustained] said motion, to which the defendant [plaintiff] at the time excepted.

16. *Motion for leave to open and close.*

That the defendant [plaintiff] moved the court for leave to open and close in [the argument of] this cause, on the ground that the burden of the issues were upon him, which motion the court overruled [sustained], and gave the plaintiff [defendant] the open and close, to which the defendant [plaintiff] at the time excepted.

17. *Objection to parol evidence.*

That on the trial of this cause the plaintiff [defendant] called as a witness in his behalf one —, and proved by him that on the — day of —, 18—, he, the witness, had a conversation with one — with reference to [*state what*], and offered to prove by said witness that in said conversation said — stated [*set out his statements*], to which the defendant [plaintiff] at the time objected [*if the objection was sustained the grounds of the objection must be set out, e. g.*], on the grounds: 1. That said conversation was not in the presence of the plaintiff [defendant], and was hearsay. 2. The same was immaterial and irrelevant. [*If the objection is overruled the grounds of the objection need not be set out.*]

And the court sustained [overruled] said objection [and said witness testified as follows: (*set out the testimony which was objected to*)]. To which ruling of the court, in overruling [sustaining] said objection [and permitting said witness to give said testimony] the plaintiff [defendant] at the time excepted.

18. *Objection to witness testifying on the ground of incompetency.*

That on the trial of this cause the plaintiff [defendant] called one — as a witness, and the defendant [plaintiff] asked leave to examine the witness as to his competency, which was granted, and the witness on such examination answered as follows: [*set out the statements of the witness or the questions and answers in full.*]

Whereupon the plaintiff [defendant] objected to the witness testifying in the cause on the grounds that [*state the grounds of his incompetency, as claimed to have been shown by his examination*], which objection was overruled [sustained] and said witness allowed to testify in the

cause, to which the defendant [plaintiff] at the time excepted, and said witness testified as follows: [*set out his testimony.*]

19. *Objection to written evidence.*

That on the trial of this cause the plaintiff [defendant] offered in evidence a certified copy of the record of a deed from — to —, to which the defendant [plaintiff] objected on the following grounds: [*state the grounds of objection*], which objection was overruled [sustained], to which the plaintiff [defendant] at the time excepted [and said copy of deed (and certificate) were read in evidence as follows: (*copy it*)].

20. *Objections to instructions given.*

That on the trial of this cause the court gave to the jury the following instructions on its own motion [asked by the plaintiff], to the giving of which instructions, and each of them, the plaintiff [defendant] at the time excepted.

21. *Refusal to give instructions.*

And the plaintiff [defendant] asked the court to give the following instructions: [*copy them*], which the court refused [on the ground that said instructions were tendered too late for the judge to examine the same], to which refusal to give each and all of said instructions plaintiff [defendant] at the time excepted.

22. *Modification of instruction.*

That the plaintiff [defendant] requested the court to give the following instruction: [*copy it.*] But the court refused to give the same as asked, and modified said instruction to read as follows: [*copy it*], [*or, by inserting at the close thereof the following words: (copy them)*], and gave the same as so modified; and to the refusal to give said instruction as asked, and the modification thereof, and the giving of the same as modified, the plaintiff [defendant] at the time excepted.

23. *Improper argument by counsel.*

That on the argument of this cause to the jury, —, counsel for plaintiff [defendant], in his argument made the following statement: [*set it out*], to which the defendant [plaintiff] at the time objected, but the court overruled said objection, and stated in the presence of the jury that the statement so made was proper, to which the defendant [plaintiff] excepted [and said —, continuing the same course of argument, said further (*state what*)] over defendant's [plaintiff's] said objection, to which defendant at the time excepted.

24. *Formal parts of bill of exceptions, showing evidence introduced, etc.*

Be it further remembered that on the — day of —, 18—, it being the — juridical day of the — term of the — Circuit Court, Hon. —, judge, presiding, the following further proceedings were had in this cause:

The cause being at issue and a jury impaneled and sworn [*or, the cause being submitted to the court for trial without the intervention of a jury*], the plaintiff, to maintain the issues on his behalf, introduced the following evidence

(a.) *Written evidence.*—Plaintiff offered and read in evidence a deed from — to —, as follows: [*here insert.*]

(b.) *Depositions.*—Also the depositions of — and —, as follows: [*here insert.*]

(c.) *Parol testimony.*— — being called for, plaintiff testified as follows: [*set out his evidence in chief.*]

And on cross-examination testified as follows: [*set out evidence on cross-examination.*]

And the plaintiff here rested.

And the defendant, to sustain the issues on his behalf, introduced the following evidence: [*set out the defendant's evidence as above.*]

And this was all the evidence given in the cause.

And the plaintiff [defendant] now tenders this his bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is done this — day of —, 18—.

[SEAL.]

—, Judge — Circuit Court.

1. What must be brought into the record by bill of exceptions. Ante, vol. 2, §§ 1073, 1074, 1077; *Redinbo v. Fretz*, 99 Ind. 458; *Scott v. The Board of Comrs., etc.*, 101 Ind. 42; *Shields v. McMahan*, 101 Ind. 591; *Washington Ice Co. v. Lay*, 103 Ind. 48; *W. U. Tel. Co. v. Frank*, 85 Ind. 480; *Warriek Build. and L. Ass'n v. Hougland*, 90 Ind. 115; *Pennsylvania Co. v. Niblack*, 99 Ind. 149; *Terrell v. Butterfield*, 92 Ind. 1; *Klingensmith v. Faulkner*, 84 Ind. 331.

2. When bill must be signed and filed. Ante, vol. 2, § 1077; *State v. Dyer*, 99 Ind. 426; *Volger v. Sidener*, 86 Ind. 545; *Ryman v. Crawford*, 86 Ind. 262.

3. Reporter's notes of evidence, how made part of. Ante, vol. 2, § 1078; *Brehm v. The State*, 90 Ind. 140; *Lee v. The State*, 88 Ind. 256.

4. Form of bill of exceptions. Ante, vol. 2, § 1078; *Peck v. Louisville, etc. Ry. Co.*, 101 Ind. 366; *Jennings v. Durham*, 101 Ind. 391; *Stout v. Turner*, 102 Ind. 418; *Indiana, etc., Ry. Co. v. Cook*, 102 Ind. 133; *Ringgenberg v. Hartman*, 102 Ind. 537; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 81; *Grubbs v. Morris*, 103 Ind. 166; *Brehm v. The State*, 90 Ind. 140; *Lake Erie, etc., Ry. Co. v. Parker*, 94 Ind. 91; *Longworth v. Higham*, 89 Ind. 352.

5. When and how amended. Ante, vol. 1, § 720; Longworth v. Higham, 89 Ind. 352.

See MOTION FOR NEW TRIAL, p. 432; ASSIGNMENT OF ERROR, p. 492; ORDER MAKING PAPERS PARTS OF THE RECORD, p. 483.

689.—Order making papers filed in the cause parts of the record without a bill of exceptions.

— }
v. } Order.
— }

Come the parties, and on motion of the plaintiff [defendant] the following papers, affidavits, and other proceedings had in this cause are hereby made a part of the record in this cause, without a bill of exceptions [*describe them particularly, e. g.*] The affidavits of — and —, made in support of plaintiff's [defendant's] motion for a new trial; the affidavits of — and —, filed by defendant [plaintiff] in opposition to said motion, etc.

1. What may be made parts of the record by order of court. Ante, vol. 2, § 1077.

PRAYER FOR APPEAL AND ORDER GRANTING— APPROVAL OF BOND.

690.—Where bond is tendered.

— }
v. } Order Granting Appeal.
— }

Come the parties, and the plaintiff [defendant] prays an appeal to the Supreme Court in this cause, and tenders his bond, with — and — as his sureties, as follows: [*here insert*], which bond is approved by the court and the appeal granted.

691.—Approving sureties and granting appeal—Bond to be given afterward.

— }
v. } Order Granting Appeal and Approving Sureties.
— }

Come the parties, and the plaintiff [defendant] prays an appeal to the Supreme Court in this cause, which is granted upon his filing bond within — days, in the penalty of — dollars, conditioned as provided by law, with — and — as sureties, who are now approved by the court.

692.—Appeal bond.

— }
v. } Appeal Bond.
 — }

Know all men by these presents, that we, —, —, and —, are held and firmly bound unto — in the penal sum of — dollars, for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated this — day of —, 18—.

The condition of the above obligation is such that whereas, heretofore, to wit, on the — day of —, 18—, the said —, in the — Circuit Court, recovered a judgment against the said — for the sum of — dollars in damages, and costs of suit, from which said judgment of said — Circuit Court the said — has taken an appeal to the Supreme Court of Indiana.

Now, if the said — shall and will duly prosecute said appeal and abide by and pay the judgment and costs which may be rendered against him [and shall also pay all damages which may be sustained by the said — for the mesne profits, waste, or damage to the land during the pendency of said appeal] [or, that he deliver or return the property, and also pay the reasonable value of its use and any damage it may sustain during the pendency of said appeal], then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

Approved —, 18—.

—, Clerk.

— [SEAL.]

— [SEAL.]

— [SEAL.]

1. Practice as to the giving of the bond. Ante, vol. 2, §§ 1088, 1090-1092; vol. 3, pp. 101-104; Mitchell v. Gregory, 94 Ind. 363; Heller v. Clark, 103 Ind. 591.

NOTICE OF APPEAL.

693.—Notice to clerk.

[Caption.]

To —, Clerk of the — Circuit Court:

You are hereby notified that the plaintiff [defendant] in the above entitled cause will appeal to the Supreme Court of the State of Indiana from the judgment rendered against him in said cause in the — Circuit Court on the — day of —, 18—.

—, Attorney for —.

I acknowledge service of the within notice, and the receipt of a copy thereof, this — day of —, 18—.

—, Clerk of the — Circuit Court.

694.—Notice to party.

[Caption.]

The above named plaintiff [defendant] is hereby notified that the defendant [plaintiff] will appeal to the Supreme Court of the State of Indiana from the judgment rendered against him in this action in the — Circuit Court on the — day of —, 18—.

[Proof of service.]

—, Attorney for —.

1. May be served on attorney of record. Ante, vol. 2, § 1093; Richardson v. Pate, 93 Ind. 423.

695.—Notice to co-party.

[Caption.]

To — and —:

You are hereby notified that —, one of the defendants [plaintiffs] in the above entitled cause, will appeal to the Supreme Court of the State of Indiana from the judgment rendered [against him] in said cause in the — Circuit Court on the — day of —, 18—.

—, Attorney for —.

1. Practice as to notice generally. Ante, vol. 2, §§ 1089, 1093, 1094.

TRANSCRIPT.

696.—Præcipe for transcript.

[Caption.]

The clerk will prepare and certify a full, true, and complete transcript of the proceedings, papers on file, and judgment [or, if only a *part of the papers and proceedings are wanted, name the particular parts specifically*], in the above entitled cause, to be used on appeal to the Supreme Court. *what 2 Wm 5/08*

—, Attorney for —.

1. What præcipe should contain. Ante, vol. 2, § 1081.

697.—General form of transcript.

Pleas and proceedings before the Honorable —, Judge of the — Judicial Circuit of the State of Indiana, and *ex officio* Judge of the — Circuit Court, at a term of said court held at the court-house in the city

of —, in — county, Indiana, commencing on the — Monday of —, 18—.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Transcript on Appeal.
— }

1. *Filing complaint.*

Be it remembered, that on the — day of —, 18—, the said plaintiff, by his attorney, —, filed in the office of the clerk of the — Circuit Court the following complaint in this cause: [*copy the complaint.*] [Or, if so, clerk may, instead of setting out complaint, say: An amended complaint having been filed, the original is, by direction of the plaintiff (defendant) omitted (and insert in its proper place the amended complaint.)]

2. *Appearance—Answer—Default.*

That afterward, on the — day of —, 18—, the same being the — juridical day of said term of said court, the following further proceedings were had in said cause by said court:

Comes the plaintiff, by his attorneys, and the defendant, —, enters his appearance herein, and the defendants, — and —, are ruled to answer the plaintiff's complaint on to-morrow morning. And it appearing to the court, by the summons issued herein and the return of the sheriff indorsed thereon, which summons and return are as follows: [*copy summons and return*] that the defendant, —, has been duly served with process more than ten days before the first day of the present term of this court, said defendant is three times loudly called, but comes not, and makes default.

3. *Filing demurrer to complaint.*

And afterward [*giving date and day of term as above*] the following further proceedings were had:

Come the parties [except the defendant, —], and the defendants [defendants, — and — (defendant, —)] file their [his separate] demurrer[s] to the plaintiff's complaint, as follows: [*copy the demurrer or demurrers.*]

4. *Ruling on demurrer.*

And afterward [*giving date, etc.*] the following further proceedings were had:

Come the parties, and the demurrer[s] of the defendant[s] heretofore filed to the complaint are [is] overruled [sustained], to which the defend-

ant [plaintiff] excepts [and leave is granted the plaintiff to amend his complaint].

5. *Answer filed—Rule to reply.*

And afterward [giving date, etc.] the following further proceedings were had :

Come the parties, and the defendants file their answer as follows: [copy the answer], and the plaintiff is ruled to reply by to-morrow morning.

6. *Demurrer to answer—Motion to strike out, and rulings thereon.*

And afterward [giving date, etc.] the following further proceedings were had :

Come the parties, and the plaintiff files his demurrer to [the — paragraphs of] the defendant's answer, as follows: [copy the demurrer] and his motion to strike out parts of [the — paragraph of] said answer, as follows: [copy motion.]

And said demurrer and motion are now submitted to the court, and the demurrer is overruled as to the — paragraph of the answer, to which the plaintiff excepts, and sustained as to the — paragraph of said answer, to which the defendant excepts.

And the motion to strike out is overruled as to the following parts of the answer: [state the parts], to which the plaintiff excepts, and sustained as to the following parts: [describe the parts], to which the defendant excepts, and the defendant is granted leave to file an amended answer.

7. *Amended answer filed—Demurrer—Ruling.*

And afterward [giving date, etc.] the following further proceedings were had :

Come the parties, and the defendants file their amended answer as follows: [copy it.]

And the plaintiff files his demurrer thereto as follows: [copy it.]

And said demurrer is now submitted to the court and overruled [sustained], to which the plaintiff [defendant] excepts.

8. *Reply filed.*

And afterward [giving date, etc.] the following further proceedings were had :

Come the parties and the plaintiff files his reply as follows: [copy it.]

9. *Demurrer to reply.*

And afterward [*giving date, etc.*] the following further proceedings were had :

Come the parties, and the defendants [defendant, ——] file[s] their [his] demurrer to the reply as follows: [*copy it.*]

10. *Ruling on demurrer—Leave to amend.*

And afterward [*giving date, etc.*] the following further proceedings were had :

Come the parties, and the demurrer to the reply, heretofore filed, is submitted to the court and sustained as to the —— paragraph, to which the plaintiff excepts, and overruled as to the —— paragraph, to which the defendants except, and leave is given the plaintiff to amend said —— paragraph of reply.

11. *Amended reply filed.*

And afterward [*giving date, etc.*] the following further proceedings were had :

Come the parties, and the plaintiff files his amended —— paragraph of reply as follows: [*copy it.*]

12. *Trial—Adjournment—Separation of jury.*

And afterward [*giving date, etc.*] the following further proceedings were had :

Come the parties, by their attorneys, and this cause being at issue [is submitted to the court for trial without the intervention of a jury], the following jury to try the same also come, namely: [*insert names of jurors*], twelve good and lawful men, resident householders [*or, freeholders*] of —— county, and legal voters therein, who are duly impaneled and sworn to impartially try the issues joined between the parties in this cause, and a true verdict render according to the law and the evidence; and the evidence being in part heard, and there not being time to complete the same to-day, the further hearing of this cause is adjourned until —— o'clock to-morrow morning. And by agreement of the parties the jury are permitted to separate under the charge of the court, as required by law.

13. *Evidence closed—Argument—Instructions.*

And afterward [*giving date, etc.*] the following further proceedings were had :

Come the parties, by their attorneys, and the jury heretofore impaneled and sworn, also come, and the evidence being fully heard and

argument of counsel being had, the court, of its own motion, instructed the jury as follows: [*copy instructions of the court.*]

And the court, at the request of the plaintiff, instructed the jury as follows: [*copy instructions asked by plaintiff as given.*]

14. *Instructions refused.*

And the defendant [at the proper time] submitted to the court the instructions following, with a request that they should be given to the jury, and the court refused to give said instructions and each of them, and indorsed thereon such refusal and the exception of the defendant thereto, which instructions, refusal, and exception were as follows: [*copy instructions refused and indorsement of refusal and exception.*]

15. *Interrogatories submitted.*

And the court submitted to the jury certain special interrogatories, to be answered, if they should agree upon a general verdict.

16. *Retirement of jury.*

And thereupon the jury retired in charge of a sworn officer to deliberate upon and consult of their verdict.

17. *Verdict and answers to interrogatories.*

And afterward [*giving date, etc.*] the following further proceedings were had:

Come the parties, and the jury, in charge of a sworn officer, also come, and return into court the following verdict: [*copy it.*]

And also return into court the special interrogatories heretofore submitted to them by the court, and their answer thereto, as follows: [*copy interrogatories and answers.*]

18. *Filing of findings and conclusions of law—Exceptions.*

And afterward [*giving date, etc.*] the following further proceedings were had:

Come the parties, and at the request of the plaintiff [defendant] heretofore made, the court files its findings of facts and conclusions of law as follows: [*copy them*], to which conclusions of law, and each of them, the plaintiff [defendant] excepts.

19. *Motion for judgment on the answers to interrogatories.*

And thereupon the plaintiff [defendant] moves the court for judgment in his favor on the answers of the jury to the special interrogatories, notwithstanding the general verdict, as follows: [*copy motion.*],

which motion is submitted to the court and overruled [sustained], to which the plaintiff [defendant] excepts.

20. *Motion for venire de novo.*

And thereupon the plaintiff [defendant] moves the court for a *venire de novo* as follows: [*copy it*], which motion is submitted to the court and overruled [sustained], to which the plaintiff [defendant] excepts.

21. *Motion and reasons for new trial.*

And afterward [*giving date, etc.*] the following proceedings were had:

Come the parties, and the plaintiff [defendant] files his motion and reasons for a new trial as follows: [*copy motion and reasons*], which motion is submitted to the court and overruled [sustained], to which the plaintiff [defendant] excepts.

22. *Motion in arrest of judgment.*

And thereupon the defendant moves the court in arrest of judgment, which motion is submitted to the court and overruled [sustained], to which the defendant [plaintiff] excepts.

23. *Judgment.*

And afterward [*giving date, etc.*] the following further proceedings were had: [*Insert the judgment rendered.*]

24. *Motion to correct judgment.*

And afterward [*giving date, etc.*] the following further proceedings were had:

Come the parties, and the plaintiff [defendant] files his motion to correct the judgment herein as follows: [*copy motion*], which motion is submitted to the court and overruled [sustained], to which the plaintiff [defendant] excepts.

25. *Time given to file bill of exceptions.*

And afterward [*giving date, etc.*] the following further proceedings were had:

Come the parties, and the plaintiff [defendant] is by the court given time until the — day of —, 18— [*or, — days in which*], to prepare, settle, and file his bill of exceptions herein.

26. *Filing bill of exceptions.*

And afterward [*giving date, etc.*] the following further proceedings were had:

Comes the plaintiff [defendant], and files his bill of exceptions as follows: [*copy bill of exceptions.*]

27. Filing appeal bond.

And afterward [*giving date, etc.*] the following further proceedings were had :

Comes the plaintiff [defendant], and files his appeal bond as follows : [*copy bond.*]

698.—Certificate to transcript.

State of Indiana, ——— County :

I, ———, Clerk of the ——— Circuit Court, in said state, do hereby certify that the above and foregoing transcript contains true and complete copies of all the papers and entries in said cause.

[I further certify that on the ——— day of ———, 18—, the official reporter, who took down the evidence in said cause, filed in my office his long-hand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions, made part of the foregoing transcript.]

In witness whereof, I hereunto set my hand and affix the seal of said court, at the city of ———, this ——— day of ———, 18—.

[SEAL.] ———, Clerk of the ——— Circuit Court.

699.—Certificate where part only of record is ordered.

State of Indiana, County of ——— :

I, ———, Clerk of the ——— Circuit Court in said state, do hereby certify that the above and foregoing transcript contains true and complete copies of the following papers and entries in said cause [*specify the parts*], as ordered to be set out therein by the written request of the plaintiff [defendant], which request is hereto attached.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of ———, this ——— day of ———, 18—.

[SEAL.] ———, Clerk of the ——— Circuit Court.

[*Attach request for transcript.*]

1. What transcript should contain. Ante, vol. 1, § 805; vol. 2, § 1081; *The State v. The St. Paul, etc., Tp. Co.*, 92 Ind. 42; *McClellan v. Bond*, 92 Ind. 424; *McFadden v. Wilson*, 96 Ind. 253; *Mathews v. Goodrich*, 102 Ind. 557; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *State v. Cooper*, 103 Ind. 75; *Klingensmith v. Faulkner*, 84 Ind. 331.

2. What sufficient certificate. Ante, vol. 2, § 1082; *Reid v. Houston*, 49 Ind. 181; *Lee v. The State*, 88 Ind. 256; *Brehm v. The State*, 90 Ind. 140.

See MOTION FOR NEW TRIAL, p. 432; BILL OF EXCEPTIONS, p. 475; ASSIGNMENT OF ERRORS, p. 492.

ASSIGNMENT OF ERRORS.

700.—General form.

State of Indiana,
In the Supreme Court, — Term, 18—.

—, Appellant, }
v. } Assignment of Errors.
—, Appellee. }

The appellant says there is manifest error in the judgment and proceedings in this cause, in this:

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The court had not jurisdiction of the subject-matter of the action.

3. The court erred in overruling [sustaining] the demurrer to the — and — paragraphs of the complaint, and each of them.

4. The court erred in overruling [sustaining] the demurrer to the — paragraph of the answer.

5. The court erred in overruling [sustaining] the demurrer to the reply.

6. The court erred in overruling defendant's motion to dismiss the action.

7. The court erred in striking out [refusing to strike out] the — paragraph of the answer.

8. The court erred in overruling [sustaining] appellant's [appellee's] motion for judgment on the answers of the jury to special interrogatories, notwithstanding the general verdict.

9. The court erred in its conclusions of law on the findings.

10. The court erred in overruling [sustaining] the motion for a *venire de novo*.

11. The court erred in overruling [sustaining] the motion for a new trial [on the former trial of the cause].

12. The court erred in overruling [sustaining] the motion in arrest of judgment.

13. The court erred in overruling [sustaining] the motion to change and modify the judgment.

Wherefore, the appellant prays that the judgment be reversed.

—, Attorney for Appellant.

1. What should be assigned as error, and how. Ante, vol. 2, § 1085; *Lee v. The State*, 88 Ind. 256; *Robbins v. Magee*, 96 Ind. 174.

2. Separate assignments, when necessary. Ante, vol. 2, § 1085;

Boyd v. Anderson, 102 Ind. 217; Robbins v. Magee, 96 Ind. 174; Hinkle v. Shelley, 100 Ind. 88; Hadley v. Milligan, 100 Ind. 49; Cooper v. Hayes, 96 Ind. 386.

701.—Assignment of error on appeal from special to general term of Superior Court.

— }
v. } Assignment of Errors.
— }

The appellant says there is manifest error in the judgment and proceedings of the court in special term, in this: [*set out errors as in Form 700.*]

Wherefore, the appellant prays that the judgment at special term be reversed. —, Attorney for Appellant.

702.—Assignment of error—Appeal from general term to Supreme Court.

—, Appellant, }
v. } Assignment of Errors.
—, Appellee. }

The appellant says there is manifest error in the judgment and proceedings of the court below, in this:

1. The court in general term erred in affirming [reversing] the judgment of the court in special term.

Wherefore, the appellant prays that the judgment of the court below be reversed. —, Attorney for Appellant.

1. What assignment must contain on appeal from Superior Court. Ante, vol. 2, § 1085; Gutperle v. Koehler, 84 Ind. 237; Hadley v. Milligan, 100 Ind. 49.

2. What record must show on appeal from reversal. Gutperle v. Koehler, 84 Ind. 237.

NOTICE OF APPEAL.

703.—Notice of appeal by Clerk of Supreme Court.

The State of Indiana to the Sheriff of the Supreme Court, greeting:

You are hereby commanded to notify — that on the — day of —, 18—, — filed in the clerk's office of the Supreme Court of Indiana a transcript of the record and proceedings in a certain suit appealed from the — Circuit Court [*or*, Superior Court of — county], in which the said — was plaintiff and the said — was defendant, and notify said appellee to appear at the state house in Indianapolis, before said Supreme Court, and defend said appeal, on the

— Monday in — next, else the same will be proceeded upon in his absence, and have you then and there this writ.

Witness my hand and the seal of said court, at the city of Indianapolis, this — day of —, 18—.

[SEAL.]

—, Clerk Supreme Court.

704.—Sheriff's return.

Came to hand the — day of —, 18—.

Served this notice on the within named — by reading the same to and within his hearing [to and within the hearing of —, attorney for said —], this — day of —, 18—.

The within named — not found.

—, Sheriff Supreme Court.

[By —, Sheriff — County, Indiana.]

1. **Service on attorney, when sufficient.** *Richardson v. Pate*, 93 Ind. 423.

SUPERSEDEAS.

705.—General form.

— }
v. } Supersedeas.
— }

On application of the appellant, it is ordered by the undersigned, one of the judges of the Supreme Court of the State of Indiana, that execution and other proceedings on the judgment of the court below be stayed, as the law directs, whenever the appellant shall have given bond according to law.

This — day of —, 18—.

—, Judge of the Supreme Court.

The State of Indiana, ss.

I, the undersigned, Clerk of the Supreme Court of the State of Indiana, hereby certify that the above is a true copy of the order to stay further proceedings in the case therein specified, as the same is found ordered on the record on file in my office.

Witness my name and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk Supreme Court.

1. **How supersedeas obtained, and its effect.** *Ante*, vol. 2, § 1095.

ANSWER TO ASSIGNMENT OF ERRORS.

706.—General form.

—, Appellant, }
 v. }
 —, Appellee. } Answer to Assignment of Errors.

The appellee, for answer to the assignment of errors herein, says:

1. That there is no error in the judgment or proceedings of the court below.

2. That the appeal in this action was not taken within three years from the rendition of the judgment from which the appeal is taken.

3. That since the rendition of the judgment below the appellee has paid thereon and the appellant has accepted and received the amount of the same in full [or, the sum of — dollars in part satisfaction of said judgment].

—, Attorney for Appellee.

1. What may be answered. Ante, vol. 2, § 1087.

REPLY.

707.—In avoidance of statute of limitations—Denial.

— }
 v. }
 — } Reply.

The appellant, for reply to the — paragraph of the appellee's answer, says:

1. That he admits that the appeal was not taken within three years from the rendition of the judgment appealed from, but says that at the time said judgment was rendered he was an infant under the age of twenty-one years, and that the appeal in this cause was taken within three years from the time he arrived of age.

2. That he denies each and every allegation of the — and — paragraphs of said answer.

—, Attorney for Appellant.

DEMURRER.

708.—To the answer.

— }
 v. }
 — } Demurrer to Answer.

The appellant demurs to the — paragraph of the appellee's answer on the following grounds:

1. The same does not state facts sufficient to constitute a defense to the assignment of errors. —, Attorney for Appellant.

709.—To the reply.

— }
v. } Demurrer to Reply.
— }

The appellee demurs to the — paragraph of reply to the — paragraph of answer on the following grounds :

1. The same does not state facts sufficient to avoid said paragraph of appellee's answer. —, Attorney for Appellee.

1. Demurrer to reply. Ante, p. 329.

CROSS-ASSIGNMENT OF ERRORS.

710.—General form.

— }
v. } Cross-Assignment of Errors.
— }

The appellee, by way of cross-assignment of errors, says that the court committed the following errors against him :

1. The court erred in overruling the demurrer to the — paragraph of the answer [*state any other errors, as in Form 700*].

Wherefore, he prays the court that if error is found as against the appellant that the foregoing assigned errors be considered, and that if the cause be reversed that it be at the cost of the appellant, and if no error is found, as against the appellant, that the cause be affirmed [*or, that the cause be reversed at the cost of the appellant*].

—, Attorney for Appellee.

MOTION TO DISMISS APPEAL.

711.—General form

— }
v. } Motion to Dismiss Appeal.
— }

[*Caption.*]

The appellee moves the court to dismiss the appeal in this cause on the following grounds :

1. The cause is not one in which an appeal lies to this court.
2. This court has not jurisdiction of the subject-matter of the action.

3. The appeal was not taken within — of the rendition of the judgment appealed from, as required by law [*state any other grounds*].
—, Attorney for Appellees.

1. **What ground for dismissal.** Ante, vol. 2, §§ 1081, 1083, 1098, 1100, 1108; *Powell v. State*, 96 Ind. 108; *Yearly v. Sharp*, 96 Ind. 469.

CERTIORARI.

712.—Affidavit for certiorari.

[*Caption.*]

—, being duly sworn, on his oath says he is the attorney for the appellant [appellee] in this cause, and that there is a diminution of the record, in this :

The — paragraph of the answer of the appellant [appellee] is omitted from the transcript [*or state any other omission*].

[*Jurat.*]

[*Signature.*]

1. **Writ of certiorari, how obtained.** Ante, vol. 2, § 1084.

713.—Notice of application for writ.

[*Caption.*]

The appellee [appellant] is hereby notified that on the — day of —, 18—, at the court room of the Supreme Court of the State of Indiana, at Indianapolis, at — o'clock A. M., or as soon thereafter as counsel can be heard, the appellant [appellee] will move said court for a writ of *certiorari*, requiring the clerk of the court below to correct the transcript on appeal in this cause by certifying up [*state what*], omitted from said transcript.
—, Attorney for —.

[*Proof of service.*]

1. **Notice, when necessary and how given.** Ante, vol. 2, § 1084; *Durbin v. Haines*, 99 Ind. 463.

714.—Order granting writ.

[*Caption.*]

Come the parties, and it appearing to the court that the transcript of the proceedings and record herein is materially diminished and defective, in this : [*state in what the transcript is defective.*]

Therefore, on motion of the appellant [appellee], it is ordered by the court that a writ of *certiorari* issue herein to the clerk of the — Circuit Court, from which court the appeal herein is taken, commanding

him forthwith to make out and certify to this court [*state what*], and that he return the same with said writ to this court without delay.

715.—Writ of certiorari.

[*Caption.*]

It having been shown to the court that the transcript in this cause is materially diminished and defective, in this: [*state the defect or omission*], it is ordered by the court that a *certiorari* be awarded to the clerk of the — Circuit Court, commanding him to forthwith make out and certify to the Supreme Court aforesaid [*state what*], and have the same, with this writ, before the judges of said Supreme Court, at the Supreme Court room, in Indianapolis, without delay.

Taken from the records of said court.

Witness my hand and the seal of said court, hereto affixed, this — day of —, 18—.

[SEAL.]

—, Clerk Supreme Court.

1. When writ will issue. Ante, vol. 2, § 1084.

SUBMISSION.

716.—By agreement in writing.

[*Caption.*]

We hereby submit the appeal in this cause for trial.

—, Attorney for Appellant.

—, Attorney for Appellee.

717.—Order submitting on default.

— }
v. } Order of submission.
— }

Comes the appellant, but the appellee, being three times called, comes not.

It is therefore ordered, on motion of the appellant, that the appeal herein be and is submitted for trial.

PETITION FOR REHEARING.

718.—General form.

[*Caption.*]

The appellant [appellee] respectfully petitions the court for a rehearing in the above entitled cause on the following grounds:

1. [*State the grounds specifically.*]

—, Attorney for —,

1. **Practice on application for a rehearing.** Ante, vol. 2, §§ 1116-1119.

2. **Power of Superior Courts to grant.** Ferrell v. Butterfield, 92 Ind. 1.

APPEAL TO UNITED STATES SUPREME COURT.

719.—Writ of error and its allowance.

United States of America.

The President of the United States of America to the Honorable the Supreme Court of the State of Indiana, greeting :

Because in the record and proceedings, as also in the rendition of judgment [*or, decree*], in a plea which is in the said Supreme Court before you, between —, plaintiff in error, and —, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by this complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the [second Monday of October next], in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said [Circuit] Court, this — day of —, A. D. 18—.

[SEAL.]

—, Clerk.

A writ of error is allowed as prayed for, upon sufficient bond, with surety, being filed and approved.

This — day of —, 18—.

—, Chief Justice of Supreme Court of Indiana.

720.—Bond and its approval.

Supreme Court of the United States.

—, Plaintiff in Error,	}	In Error to the Supreme Court of Indiana.
—, Defendant in Error.		
v.		

Know all men by these presents, that we [*insert names of plaintiff in error and sureties, or sureties alone*] are held and firmly bound unto the

above named —, defendant in error, in the sum of — dollars, to be paid to said defendant in error, to which payment, well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals, and dated this — day of —, 18—.

Whereas, the above named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment [decree] rendered in the above entitled suit by the Supreme Court of the State of Indiana:

Now, therefore, the condition of this obligation is, that if the above named plaintiff in error shall prosecute the said writ of error to effect and answer all costs and damages that may be adjudged or awarded against him, if they shall fail to make good this plea, then this obligation to be void; otherwise, in full force.

——. [L. S.]

——. [L. S.]

——. [L. S.]

——. [L. S.]

——. [L. S.]

Taken and approved by me, this — day of —, 18—.

——, Chief Justice of the Supreme Court of Indiana.

721.—Citation.

United States of America, ss.

To — [defendant in error], greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the [second Monday of October next], pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Indiana, wherein — is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment [decree] mentioned shall not be corrected, and speedy justice should not be done to the parties in this behalf.

Attest: The Chief Justice of the Supreme Court of the State of Indiana, this — day of —, 18—.

——, Chief Justice of the Supreme Court of Indiana.

[*Proof of service.*]

1. Appeals to United States Supreme Court, how taken, and practice generally. Rev. Stat. U. S., §§ 997-1013, and cases cited.

SECTION CXVI.

REMOVAL OF CAUSES TO UNITED STATES COURTS.

722.—Petition for removal—Citizenship—Local prejudice.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Petition for Removal of Cause to Federal Court.
— }

To the Honorable the — Circuit Court of the County of —, State of Indiana:

Your petitioner, —, respectfully shows that he is plaintiff in the foregoing entitled suit, and that the same was by him commenced on or about the — day of —, 18—, in said — Circuit Court; that your petitioner was at the time of bringing said suit, and still is, a citizen of the State of —, and a resident thereof; that there is and was at the time said suit was brought a controversy therein between your petitioner and the said defendant, —, who is a citizen of the State of — and a resident thereof.

That this suit was brought for the purpose of [*state what*], and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

That the suit has not been tried, but is now pending for trial in the — Circuit Court of the State of Indiana for the county of —, and that your petitioner desires to remove the same into the Circuit Court for the District of Indiana, in pursuance of section 639 of the Revised Statutes of the United States, subdivision 3.

That your petitioner has filed the affidavit required by the statute in such cases, and offers herewith his bond, executed by —, of —, as surety, in the penal sum of — dollars, conditioned as required by said statute.

Wherefore, your petitioner prays that said bond may be accepted, and that this suit may be removed into the next Circuit Court of the United States in and for said District of Indiana, and that no further proceedings may be had therein in this court.

—, Attorney for Plaintiff.

723.—Affidavit of prejudice or local influence.

State of Indiana, — County.
In the — Circuit Court, — Term, 18—.

— }
v. } Affidavit.
— }

State of Indiana, County of —, ss.

I, —, being duly sworn, say that I am one of the plaintiffs [defendants] in the above entitled suit; that I have reason to believe, and do believe, that from prejudice and local influence the plaintiffs [defendants] will not be able to obtain justice in said state court.

[Signature.]

Subscribed by the said — in my presence, and by him sworn to before me, at —, this — day of —, 18—.

—, Notary Public in and for — County.

1. In what cases removal may be had, and by whom, and from what courts. Ante, vol. 2, §§ 1546–1548; Rev. Stat. U. S., § 639; Supl. Rev. Stat. U. S., p. 174, § 2; Dillon's Rem. of Causes, pp. 12 et seq., 48, 60, 62, 67; Meyer v. Del. R. R. Const. Co., 100 U. S. 457; Gibson v. Bruce, 108 U. S. 561; Smith v. Akers, 6 Sup. Ct. Rep. 669; Myers v. Swann, 107 U. S. 546; Jefferson v. Driver, 6 Sup. Ct. Rep. 729; Stone v. State of South Carolina, 6 Sup. Ct. Rep. 799.

2. When application must be made. Ante, vol. 2, § 1549; Rev. Stat. U. S., § 639; Supl. Rev. Stat. U. S., p. 174, § 2 (Act 1875, 18 Stat. at L. 470); Dillon's Rem. of Causes, p. 73; Meyer v. Del. R. R. Const. Co., 100 U. S. 457; Cable v. Ellis, 110 U. S. 389; Goodnow v. Dalliver, 26 Fed. Rep. 469; Fletcher v. Hamlet, 6 Sup. Court Rep. 426; Babbitt v. Clark, 103 U. S. 616; Phoenix Mut. L. Ins. Co. v. Walrath, 6 Sup. Ct. Rep. 768; Sharp v. Gletcher, 74 Ind. 357; Continental L. Ins. Co. v. Kessler, 84 Ind. 310.

3. What petition must contain. Ante, vol. 2, § 1550; Rev. Stat. U. S. 639; Supl. Rev. Stat. U. S. 174 (Act 1875, 18 Stat. at L. 470); Dillon's Rem. of Causes, p. 84; Meyer v. Del. R. R. Const. Co., 100 U. S. 457.

4. Affidavit, when necessary and what must state. Rev. Stat. U. S., § 639, sub. 3; Dillon's Rem. of Causes, p. 84; Hart v. City of New Orleans, 14 Fed. Rep. 180.

5. When attorney may make affidavit and what must swear. Hart v. City of New Orleans, 14 Fed. Rep. 180.

6. Effect of petition, affidavit, and bond on jurisdiction of court. Dillon on Rem. of Causes, pp. 75, 98; Stone v. State of South Carolina, 6 Sup. Ct. Rep. 799; New Orleans, etc., R. R. Co. v. Mississippi, 102 U. S. 135.

724.—By non-resident defendant for removal of suit as to him, under Rev. Stat., sec. 639, subdivision 2.

[*Caption and commencement as in Form 722.*]

Your petitioner, —, respectfully shows that he is one of the defendants in the above entitled suit, and was at the time said suit was brought, and still is, a non-resident of the State of Indiana and a citizen and resident of [the State of] —; that his co-defendants, — and —, are, and were at the time the suit was brought, citizens and residents of the State of Indiana, and the plaintiff[s] was [were] at the time the suit was brought, and still are, citizens and residents of the State of Indiana.

That said action was brought for the purpose of [*state the nature of the suit and the relief prayed for*], and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

That this suit is one in which there can be a final determination of the controversy, so far as concerns this petitioner, without the presence of the other defendants as parties in the cause.

That this suit has not been tried, but is now pending for trial in the — Circuit Court of the State of Indiana, and that your petitioner desires to remove the same into the Circuit Court of the United States for the District of Indiana, in pursuance of the Revised Statutes of the United States, section 639.

Your petitioner further shows that he has filed his bond, as required by law in such cases, executed by — and —, of —, as sureties, in the penal sum of — dollars, conditioned as required by said statute.

Wherefore, your petitioner prays that said bond may be accepted and approved, and that this suit may be removed into the next Circuit Court of the United States in and for said District of Indiana, for trial, and that no further proceeding may be had therein, as to this petitioner, in this court. —, Attorney for Defendant, —.

1. When one defendant entitled to removal—Separable controversy. Rev. Stat. U. S., § 639, sub. 2; Supl. Rev. Stat., p. 174. §§ 2, 3; Dillon's Rem. of Causes, p. 19; Case of Sewing Machine Co's, 18 Wal. 583; Ayres v. Wiswell, 112 U. S. 187; Carson v. Tvedt, 115 U. S. 41; Beuttel v. Chicago, etc., Ry. Co., 26 Fed. Rep. 50; In re Estate of McClean, 26 Fed. Rep. 49; Lyddy v. Gano, 26 Fed. Rep. 177; Starin v. City of N. Y., 6 Sup. Ct. Rep. 28; Coney v. Winchell, 6 Sup. Ct. Rep. 366; Sloane v. Anderson, 6 Sup. Ct. Rep. 730; Fidelity Ins., etc., Co. v. Huntington, 6 Sup. Ct. Rep. 733; Rand v. Walker, 6 Sup. Ct. Rep. 769.

See Forms 722, 723, and notes.

725.—Petition under Act of 1875.

[*Caption and commencement as in Form 722.*]

Your petitioner respectfully shows to the court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different states, and that the petitioner was, at the time of the commencement of this suit, and still is, a citizen of the State of —, and that — was then, and still is, a citizen of the State of —. [*Give names and citizenship of all parties plaintiff and defendant.*]

[*If the application is by a part of the defendants, say:* That in said suit there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between this petitioner and the said — and said —.]

[*If the right of removal is claimed on the ground that the question presented is a federal question, say:* That this suit is one arising under the constitution (laws) (treaties made under the authority) of the United States, in this: (*state the facts showing the suit to be within the Act of 1875.*)]

Your petitioner offers herewith a bond, with good and sufficient surety, for his entering in the Circuit Court of the United States for the District of Indiana, on the first day of its next session, a copy of the record of this suit and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, he prays the court that said bond be accepted and approved; that this suit be removed for trial to the Circuit Court of the United States for the District of Indiana, and that no further proceedings be had therein in this court.

—, Attorney for Petitioner.

1. Right of removal under Act of 1875. Supl. Rev. Stat. U. S., p. 174; Dillon's Rem. of Causes, pp. 26 et seq., 88; Lawrence v. Norton, 13 Fed. Rep. 1; Pacific R. R. Removal Cases, 115 U. S. 11.

See Forms 723, 724, and notes.

2. Question "arising under constitution or laws of United States," what is. Dillon's Rem. of Causes, pp. 28, 89; New Orleans, etc., R. R. Co. v. Mississippi, 102 U. S. 135; Kurtz v. Moffitt, 6 Sup. Ct. Rep. 148; Starin v. Mayor, etc., of the City of N. Y., 6 Sup. Ct. Rep. 28; Van Allen v. Atchison, C. & B. Ry. Co., 3 Fed. Rep. 545.

3. When petition must be filed. Supl. Rev. Stat. U. S., p. 174, § 3; Dillon's Rem. of Causes, pp. 78, 83; Sharp v. Gletcher, 74 Ind. 357; Continental L. Ins. Co. v. Kessler, 84 Ind. 310.

726.—Bond under Revised Statutes, sec. 639.

Know all men by these presents, That we, — as principal, and —, of —, as surety, are held and firmly bound unto — in the penal sum of — dollars, lawful money of the United States, for the payment of which we bind ourselves jointly and severally firmly by these presents.

The condition of this obligation is such that if the said — shall enter and file, or cause to be entered and filed, in the next Circuit Court of the United States in and for the District of Indiana, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings [concerning or affecting the petitioner] in a certain suit now pending in the — Circuit Court of the county of —, State of Indiana, in which — is plaintiff and — defendant [*if special bail was originally requisite, add: and shall appear and enter special bail in said cause*]; and shall do such other acts as are required by law to be done upon the removal of such suit from said state court to said United States court, then this obligation to be void; otherwise, to remain in full force.

Dated this — day of —, 18—.

— [L. s.]

— [L. s.]

State of —, — County, ss.

I, —, of said county, being duly sworn, say that I am the surety named in the foregoing bond; that I am a resident of the State of Indiana, and the holder and owner of property therein; that I am worth the sum of — dollars over and above all my debts and liabilities, exclusive of property exempt from execution: that I have property in the State of Indiana liable to execution of the value of more than — dollars.

[Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

Approved by me, this — day of —, 18—.

—, Judge of the — Circuit Court.

727.—Bond under Act of 1875.

Know all men by these presents, That we, — as principal, and — and — as sureties, are held and firmly bound unto — in the penal sum of — dollars, to the payment whereof, well and truly to be made unto the said —, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally by these presents.

The conditions of this obligation are such that the said — having petitioned the — Circuit Court of the county of —, State of Indiana, for the removal of a certain cause therein pending, wherein — is plaintiff and — is defendant, to the Circuit Court of the United States in and for the District of Indiana :

Now, if the said — shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit [and shall then and there appear and enter special bail in said suit], and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void ; otherwise, to be and remain in full force.

Witness our hands and seals this — day of —, 18—.

— [L. S.]

— [L. S.]

[*Affidavit and approval as in Form 726.*]

— [L. S.]

1. What sufficient bond. Rev. Stat. U. S. 639; Supl. Rev. Stat. U. S., p. 174, § 3; Dillon's Rem. of Causes, pp. 90, 91; Meyer v. Del., etc., R. R. Const. Co., 100 U. S. 457; Combs v. Nelson, 91 Ind. 123.

728.—Order of removal.

[*Title.*]

The plaintiff [defendant] herein having, within the time provided by law, filed his petition [and affidavit] for the removal of this suit to the Circuit Court of the United States for the District of Indiana, and having, at the same time, offered good and sufficient surety, pursuant to statute; and the court finding that the plaintiff [defendant] is a resident of the State of —, and that he is entitled to such removal, said petition [affidavit] and bond are accepted, and it is hereby ordered by the court that this suit be removed for trial into the next Circuit Court of the United States for the District of Indiana, pursuant to the statutes of the United States; and all further proceedings in this court, in this cause, are hereby stayed.

SECTION CXVII.

MISCELLANEOUS FORMS

IN PARTICULAR CASES AND PROCEEDINGS.

NOTE.—Under this title all forms of general use in practice, not heretofore set out, are arranged under appropriate headings, in alphabetical order, including Affidavits, Bonds and Undertakings, Executions, Motions, Orders, Record Entries, and various others.

I. ADOPTION OF HEIRS.

729.—Petition to adopt child.

In the matter of the petition of — for the adoption of —.
To the Honorable the Judge of the — Circuit Court:

Your petitioner respectfully shows that his [her] name is —, and that he [she] resides at —, in the county of —, State of Indiana.

That he [she] is desirous of adopting —, who was born the — day of —, 18—, and is of the age of — years, as his [her] heir at law.

That said — has personal property of the value of — dollars, but no realty [*or, has no property, real or personal*].

That he [she] has no father or mother living [*or, the father (mother) of said — is dead, and her mother (father), — —, resides at —*].

That said — resides with — at — [*or, is an inmate of the Indiana Reformatory Institute for Women and Girls (The Indiana Reform School for Boys), but was not committed thereto for crime or incorrigibility*].

Wherefore, your petitioner prays that said — be adopted as his [her] heir at law, and that his [her] name be changed to that of —.

[*Verification.*]

[*Signatures.*]

1. What petition must contain. Ante, vol. 2, § 1275

730.—Consent of parents.

[*Title as above.*]

We, — and —, parents of —, a child of the age of — years, hereby consent to his [her] adoption by —, as prayed for in his [her] petition, filed in this court on the — day of —, 18—.

[*Signatures.*]

1. Consent of parents in open court necessary—Exception. R. S. 1881, § 827; ante, vol. 2, § 1276.

731.—Consent of Board of Control of Indiana Reform School for Boys, or Board of Managers of The Indiana Reformatory Institution for Women and Girls.

Proceedings had before the Board of Control of The Indiana Reform School for Boys [Board of Managers of The Indiana Reformatory Institution for Women and Girls], this — day of —, 18—.

In the matter of the petition of — to the — Circuit Court for the adoption of —, one of the inmates of said school [institution].

On motion of —, it is ordered that the consent of this board be, and the same is hereby given to the adoption of —, an inmate of The Indiana Reform School for Boys [Reformatory Institution for Women and Girls], by —, as prayed for in his petition to the — Circuit Court.

A true copy from the record of the board.

[L. S.]

—, President.

Attest: —, Secretary.

1. Consent must be filed, when. R. S. 1881, § 827; ante, vol. 2, §§ 1275, 1276.

732.—Order of adoption.

In the matter of the petition of — for the adoption of —.

Comes — and files his [her] petition for the adoption of — as his [her] heir at law, as follows: [*here insert*], and — and —, parents of said —, also come, and in open court consent to said adoption [*or, and shows that the parents of said — are dead; or, by two competent witnesses that the residence of the parents of said — is unknown and can not by reasonable diligence be discovered*].

And the court having heard the evidence, and being fully advised in the premises, finds that the allegations of the petition herein are true, and that it is for the best interest of — that he [she] be adopted by the petitioner.

It is therefore ordered by the court that the said — be and she is hereby adopted as the heir at law of said —, and that her name be changed to that of —.

It is further ordered that the petitioner, —, pay the costs of this proceeding.

1. Order of adoption and its effect. R. S. 1881, § 825; ante, vol. 2, § 1277; *Krug v. Davis*, 87 Ind. 590; *Davis v. Krug*, 95 Ind. 1; *Humphries v. Da-*

vis, 100 Ind. 274; *Humphries v. Davis*, 100 Ind. 369; *Paul v. Davis*, 100 Ind. 422; *Brown v. Brown*, 101 Ind. 340.

2. **Husband and wife may adopt jointly.** *Krug v. Davis*, 87 Ind. 590.

3. **Order, how and for what causes may be set aside.** *Brown v. Brown*, 101 Ind. 340.

733.—Record of adoption in another state.

In the matter of the adoption of — by — in the State of —.

Comes — and shows to the court that he [she] [is now and] was on the — day of —, 18—, a resident of —, in the county of —, State of —, and that he [she] was on said — day of —, 18—, pursuant to the law of said state, by an order of the — Court of said county and state, duly adopted as the heir at law of —, and files in this court a copy of the record of said proceedings and order of adoption as follows: [*here insert.*]

It is therefore ordered by the court that the said — be, and he [she] is hereby adopted as the heir at law of said — in this state, and that he [she] pay the costs of this proceeding.

See R. S. 1881, § 829; ante, vol. 2, § 1278.

2. AFFIDAVIT.

See AGREED CASE, p. 7; ARREST AND BAIL, p. 514; ATTACHMENT, p. 525; ATTACHMENT FOR WITNESS, p. 417; ATTORNEY AT LAW, p. 529; BASTARDY, p. 534; CERTIORARI, p. 497; CHANGE OF NAME, p. 539; CHANGE OF VENUE, p. 540; CONTEMPT OF COURT, p. 543; CONTINUANCE, p. 547; COSTS, p. 549; DEFAULT, p. 549; DIVORCE AND ALIMONY, p. 552; EXECUTIONS, p. 586; EXEMPTION, p. 590; EVIDENCE, p. 426; HABEAS CORPUS, p. 161; INTERPLEADER, p. 596; MANDATE AND PROHIBITION, p. 605; PUBLICATION, p. 324; REDEMPTION, p. 634; REMOVAL OF CAUSES, p. 502; REPLEVIN, p. 636; SUMMONS, p. 323.

3. ARBITRATION AND AWARD.

734.—Agreement to submit.

Know all men, that we, — and —, of —, do hereby promise and agree to and with each other to submit all questions and claims between us [*or if the submission is limited to any specific matter describe it particularly*] to the arbitration and determination of —, —, and

—— [or any two of them], whose decision and award [shall be made in writing on or before the —— day of ——, 18——, and when so made] shall be final and conclusive on us.

[If the arbitration is intended to be a statutory one, add:] We further agree that this submission be made a rule of the —— Circuit Court of the State of Indiana.

Attest: ——.

—— [SEAL.]

—— [SEAL.]

1. What may be submitted and how. Ante, vol. 2, § 1279; *Boots v. Canine*, 94 Ind. 408; *Dilks v. Hammond*, 86 Ind. 563.

735.—Arbitration bond.

Know all men by these presents, That we, ——, as principal, and —— as surety, are held and firmly bound to —— in the sum of —— dollars.

The condition of this obligation is such that, whereas, the above named —— and —— have agreed [in writing] to submit all questions and claims between them [or if a specific matter, set it out as in the submission] to the arbitration and determination of ——, ——, and —— [or any two of them], [and that said submission be made a rule of the —— Circuit Court of the State of Indiana].

Now, therefore, if the undersigned, ——, shall well and truly abide by and perform such award as shall be made by said arbitrators [or any two of them] [in accordance with said submission], then this obligation to be void; otherwise, to be and remain in full force.

[Signatures.]

1. What bond should contain. R. S. 1881, § 832; ante, vol. 2, § 1279.

2. Action on bond. Ante, p. 104.

736.—Notice of meeting of arbitrators.

To ——:

You are hereby notified that ——, ——, and ——, named as arbitrators in our agreement of submission of the —— day of ——, 18——, will meet at ——, in —— township, —— county, Indiana, on ——, the —— day of ——, 18——, at —— o'clock in the forenoon, to qualify as such arbitrators and hear and determine the matters submitted to them.

[Signature.]

Dated this —— day of ——, 18——.

737.—Notice to arbitrators to meet.

To —, —, and — :

You are hereby notified that you have been chosen as arbitrators to determine a controversy between — and myself, as more fully appears by our agreement of submission of the — day of —, 18—.

You are further notified that I hereby appoint the place of your meeting at —, in — township, — county, Indiana, and the time at — o'clock in the forenoon of the — day of —, 18—, at which time and place you are respectfully requested to be present to qualify as such arbitrators, and proceed to hear and determine the matters submitted to you. [Signature.]

Dated this — day of —, 18—.

1. Notice, when necessary and how and to whom given. R. S. 1881, § 833; ante, vol. 2, § 1280.

738.—Oath of arbitrators.

We and each of us do swear that we will faithfully and fairly hear and examine the matters in controversy between — and —, submitted to us, and make a just award according to the best of our understanding. So help us God.

[Jurat.]

[Signatures.]

1. Form of oath. R. S. 1881, § 834; ante, vol. 2, § 1280.

739.—Revocation.

To —, —, and — :

Please take notice that I hereby revoke your powers as arbitrators under the submission made to you by — and myself [in writing] on the — day of —, 18—.

[Signature.]

Dated this — day of —, 18—.

1. Submission, when and how revoked and its effect. Ante, vol. 2, § 1290.

740.—Award.

In the matter of the arbitration between — and —.

We, —, —, and —, to whom was submitted the matters of controversy between — and —, as set out in the written submission thereof to us, as arbitrators, on the — day of —, 18—, make the following award :

We met at —, in the county of —, on the — day of —,

18—, at — o'clock A. M. [pursuant to notice given by —], and being then and there duly qualified, said — and — both being present [in person and by their attorneys], we proceeded to the hearing and examination of the matters in controversy between said parties, and having heard the evidence and being fully advised in the premises, we find [*set out the facts as found, e. g.*] that on the — day of —, 18—, — executed to — his note for — dollars, payable on or before the — day of —, 18—, upon which there is now due the sum of — dollars.

We further find that there is due from — to —, on an account for goods furnished and work done, the sum of — dollars, which is a valid offset against the amount due on said note, and should be deducted therefrom, leaving a balance due to — from — on said note, of — dollars.

We further find that there is no other matter of controversy between the parties.

We therefore award to the said —, to be paid by said —, the said sum of — dollars, upon payment of which the said — is to surrender said note and execute to said — his receipt in full for all demands to the date of the submission under which this award is made [*or state such relief as the arbitrators find the parties to be entitled under the submission and findings*].

In witness whereof, we hereunto set our hands, this — day of —, 18—. [Signatures.]

Attest: —.

1. How award made and signed. R. S. 1881, §§ 838, 842; ante, vol. 2, § 1281.

2. Effect of award. Ante, vol. 2, § 1281; vol. 3, pp. 104, 105; Dilks v. Hammond, 86 Ind. 563; Russell v. Smith, 87 Ind. 457.

3. Effect of recitals in the award. Boots v. Canine, 94 Ind. 408.

741.—Rule to show cause.

In the matter of the arbitration between — and —.

Comes —, one of the parties to said arbitration, and proves by —, a subscribing witness thereto, the execution of the submission to the arbitration of —, —, and —, and makes proof by —, a subscribing witness thereto [*or, by —, one of said arbitrators*] of the making and execution of the award of said arbitrators, and proves to the satisfaction of the court that the said — has been duly served with a copy of said award, and that said agreement of submission and award were duly filed in this court on the — day of —, 18—.

It is therefore ordered by the court that said submission and award be and the same are entered of record in this court, as follows: [*copy submission and award on the record in full.*]

It is further ordered that said — be and he is hereby ruled to show cause, if any he has, on or before the — day of the present [next] term of this court, why judgment shall not be rendered on said award.

1. **What necessary to warrant the rule.** Ante, vol. 2, §§ 1284, 1285.

742.—Objections to the award.

[*Title as above.*]

—, one of the parties to the above arbitration, in compliance with the rule to show cause why judgment should not be entered on the award, objects to said award, and the rendition of judgment thereon by this court, on the following grounds:

1. That the submission to the said arbitrators was obtained by fraud, in this: [*state the acts of fraud particularly.*]

2. That said award was obtained by fraud [corruption] [undue means], in this: [*state the facts particularly.*]

3. That there was evident partiality [corruption] in the arbitrators [—, one of the arbitrators], in this: [*state the particulars.*]

4. That the arbitrators were guilty of misconduct in refusing to postpone the hearing from the — day of —, 18—, to a later day, upon a sufficient showing, and in refusing to hear the following evidence, material and competent to the controversy: [*describe the evidence offered and excluded; state any other misconduct*], by which my rights have been materially prejudiced

5. That the arbitrators exceeded their powers under said submission, in this: [*state the particulars.*]

[*Signature.*]

1. **On what grounds award may be objected to under a rule to show cause.** Ante, vol. 2, § 1286; *Russell v. Smith*, 87 Ind. 457; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Beeber v. Bevan*, 80 Ind. 31.

743.—Confirmation of award and judgment.

[*Title as above.*]

Come the above named parties, and said —, in discharge of the rule to show cause herein, files his objection to the award of the arbitrators, as follows: [*here insert*], which objections are submitted to the

court, and the evidence being heard the court overrules the same, to which said — excepts.

It is therefore ordered by the court that said award be, and the same is hereby confirmed, and the court renders judgment thereon.

It is therefore considered and adjudged by the court that — recover of — the sum of — dollars, as awarded by said arbitrators, and that — surrender the note mentioned in said award and execute to — his receipt in full for all demands to the date of said submission.

For practice generally in arbitrations, see vol. 2, §§ 1279-1290; vol. 3, pp. 104, 105.

4. ARREST AND BAIL.

744.—The affidavit.

State of Indiana, County of —.
In the — Circuit Court, — Term, 18—.

— }
v. } Affidavit for Order of Arrest.

—, being duly sworn, says he is the attorney (agent) for the plaintiff in the above entitled cause.

That the defendant is indebted to the plaintiff, in the sum of — dollars, on a promissory note given by the defendant to plaintiff on the — day of —, 18—, it being the note, a copy of which is made part of the complaint in this action, which sum is now due and unpaid [*or state specifically any other right of recovery on an existing debt or damages*], and that he believes the defendant is about to leave the state, taking with him property [*or, money*] [*or, effects*], which should be applied to the payment of plaintiff's said debt [*damages*], with intent to defraud the plaintiff.

[*Jurat.*]

[*Signature.*]

1. What affidavit must contain. R. S. 1881, § 857; ante, vol. 2, § 1292.

2. Who may make. R. S. 1881, §§ 857, 869; ante, vol. 2, § 1292.

745.—Undertaking.

[*Title as above.*]

We undertake that the plaintiff in the above entitled cause shall pay to the defendant all damages which he may sustain by reason of

his arrest herein, if the order of arrest is wrongfully obtained, not exceeding double the amount of plaintiff's claim. [Signatures.]

Approved by me, this — day of —, 18—.

—, Clerk [Judge] of the — Circuit Court.

1. Form of undertaking. R. S. 1881, § 858; ante, vol. 2, § 1293.

746.—Order of arrest.

State of Indiana, — County.

— Circuit Court, — Term, 18—.

— }
v. } Order of Arrest.
— }

The State of Indiana to the Sheriff of — county, greeting:

The affidavit of the plaintiff having been filed in the office of the clerk of the — Circuit Court, showing that the defendant is indebted to the plaintiff in the sum of — dollars, and that he believes the defendant is about to leave the state, taking with him property subject to execution [money] [effects], which should be applied to the payment of plaintiff's debt [damages], with intent to defraud the plaintiff, and also his undertaking, as required by law, with — as surety:

You are therefore ordered and directed to forthwith arrest the defendant, and hold him to bail in the sum of the plaintiff's claim and costs, and make return of this order on the — day of —, 18—, at — o'clock A. M., together with the recognizance of the defendant, if any be taken.

Witness my hand and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk of the — Circuit Court.

1. What order must contain. R. S. 1881, § 859; ante, vol. 2, § 1293.

747.—Recognizance of special bail.

[Title as above.]

I, —, of the county of —, State of Indiana, hereby acknowledge myself special bail for the defendant in the above entitled cause.

Dated this — day of —, 18—.

[Signature.]

1. What recognizance must contain. R. S. 1881, § 861; ante, vol. 2, § 1294.

2. Must be indorsed on order of arrest and signed by surety. R. S. 1881, § 861; ante, vol. 2, § 1294.

748.—Sheriff's return.

The within writ came to hand —, 18—, at — o'clock — M.

Served the same by arresting —, named therein, and taking his special recognizance bail, with — as surety as indorsed hereon.

[Or if bail is not given, say: And said — having failed to furnish special recognizance bail, I now bring his body into court.]

—, Sheriff — county.

1. When return must be made. R. S. 1881, § 862; ante, vol. 2, § 1294.

749.—Notice by special bail of surrender of principal.

[Title of cause.]

To — [plaintiff in the action]:

You are hereby notified that on the — day of —, 18—, I, as special bail for the defendant in the above cause, surrendered said defendant to —, sheriff of — county, at —, Indiana.

Dated this — day of —, 18—.

[Signature.]

1. Notice, when, how and to whom given. R. S. 1881, § 877; ante, vol. 2, § 1297.

5. ASSESSMENT OF DAMAGES.

750.—Application for writ to assess damages for lands taken for a mill-dam.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Application for Writ of Assessment of Damages.

— complains of —, and alleges:

That the plaintiff is the owner [in fee-simple] of the following real estate in the county of —, State of Indiana: [describe it particularly.]

That said real estate is situate on the — side of a water-course, known as — creek [river], and borders thereon.

That he desires to erect [has erected] on said real estate a flouring mill, the machinery thereof to be propelled by water to be taken from said water-course.

That he desires to construct a dam across said water-course, which is necessary, in order to procure water sufficient to propel the machinery of said mill.

That in the construction of said dam it is necessary to abut the same

upon the following real estate situate on the — side of said water-course and bordering thereon: [*describe it particularly*].

That the above named — is the owner of said last described real estate, and resides thereon

That — and — are the owners of real estate above said proposed dam on said stream, and — and — own real estate below the same.

That said parties reside at [*state their residences*], and are the only persons whose property will be affected by said dam, if constructed.

Wherefore, the plaintiff prays the court that a writ of assessment of damages may issue herein, and that the damages which may accrue to the defendants by the taking of said real estate for said purpose be assessed as provided by law, and that upon payment of the amount assessed the said real estate be condemned to his use for the erection of the abutment of said dam and for all other proper relief.

—, Attorney for Plaintiff.

751.—Application by land-owner for assessment of damages against a railroad company.

[*Caption as in preceding form.*]

The plaintiff complains of the defendant, and alleges:

That the plaintiff is the owner of certain real estate in the county of —, State of Indiana.

That the defendant, on the — day of —, 18—, and at divers times thereafter, entered upon said real estate, and has located and fixed the line of its railroad, known as the — railroad, through and across plaintiff's said lands, and has taken and appropriated for said road the following part of said real estate: [*describe the part actually appropriated particularly.*]

That said strip of land was taken and appropriated by the defendant under section 905 (3907) of the Revised Statutes of the State of Indiana.

That the real estate so taken by the defendant is, and was at the time it was appropriated, of the value of — dollars, and plaintiff has, by the appropriation thereof, been damaged in the sum of — dollars, no part of which has been paid or tendered.

Wherefore, plaintiff prays the court that a writ of assessment of damages may issue herein, and that he have judgment for the amount of damages assessed.

—, Attorney for Plaintiff.

1. What application must contain. R. S. 1881, §§ 883, 906, 3907; ante, vol. 2, § 1299.

752.—The writ.

State of Indiana, — county, ss.

The State of Indiana to the Sheriff of — county :

Whereas, — has filed in the office of the clerk of this court his application against — for a writ of assessment of damages, in which application it is alleged [*set out the material parts of the application or copy it in full*].

Now, therefore, you are hereby directed to impanel a jury of — [*not less than six nor more than twelve*] disinterested freeholders of said county, to meet upon the lands described in the application [*as belonging to said —*] on a day to be fixed by you; that you give notice to said — and —, and proceed to cause the damages of said —, by reason of the premises, to be assessed, as provided by law, and return your doings to this court without unnecessary delay.

Witness my hand and the seal of said court, hereto attached, this — day of —, 18—.

[L. s.]

—, Clerk of the — Circuit Court.

1. What writ must contain. R. S. 1881, §§ 886, 905; ante, vol. 2, § 1300.

753.—Oath of jurors.

[*Title of cause as in Form 750.*]

We, the undersigned, jurors in the above entitled cause, solemnly swear that we will well and truly perform the duties of jurors in said cause, and a true inquest return, according to the law and evidence. So help us God.

[*Signatures.*]

Subscribed and sworn to before me, this — day of —, 18—.

—, Sheriff — County.

754.—Notice by sheriff of time of meeting of jury.

[*Caption as in Form 750.*]To — [*plaintiff or defendant*] :

You are hereby notified that the jury to assess the damages in the above entitled cause under the application of —, filed in the office of the clerk of the — Circuit Court, on the — day of —, 18—, will meet on the — day of —, 18—, at — o'clock A. M., on the premises [*or state other place*], to assess the damages to the plaintiff [*defendant*] by the appropriation of the following real estate : [*describe it*], as prayed for in said application. —, Sheriff — County.

Dated this — day of —, 18—.

1. **What sufficient notice.** Indiana, etc., Ry. Co. v. Allen, 100 Ind. 409.
2. **When given and on whom served.** R. S. 1881, § 886.

755.—Inquest.

[Caption as above.]

We, the undersigned, jurors in the above entitled cause, having examined the real estate described in the application herein and the surrounding premises, and heard the evidence, find as follows:

1. [*If the proceeding is in case of the erection of a mill or other machinery, find on all the facts required by section 887 of the Revised Statutes, e. g.:*] That the real estate proposed for an abutment for plaintiff's dam is of the value of — dollars, and we set the same off to plaintiff as follows: [*describe it by metes and bounds.*]

2. That we have examined the lands above and below the dam, the property described in the writ herein, and find that no lands, mansion-houses, gardens, or any improvements or appurtenances thereto belonging, will be overflowed or otherwise injured. [*Or, if so, say: the following lands of the defendant, —, and his mansion-house and garden situate thereon, to wit: (describe it) will be overflowed by the water backed up by said proposed dam, and will be damaged thereby in the sum of — dollars.*]

3. That the navigation of said stream will not be obstructed nor the health of the neighborhood annoyed or injured [*or, if so, state that the stream will be obstructed, and explain how, and that the health of the neighborhood will be injured, and how.*].

4. That said mill [machinery] will [not] be of public utility.

5. That by the construction of the proposed race [embankment] [excavation] through the immediate lands of the defendant, — [plaintiff], the same will be damaged in the sum of — dollars.

6. That the construction of the proposed dam [race] will divert the water from said stream, to the damage of the defendant, — [plaintiff], — dollars.

7. That the defendants, — and — [plaintiffs], will be otherwise damaged [*state how*] in the sum of — dollars. [Signatures.]

1. **What inquest must contain.** R. S. 1881, §§ 887, 908.

756.—Sheriff's return.

The within writ came to hand — —, 18—, at — o'clock — m.

That, in pursuance thereof, I impaneled a jury of — disinterested freeholders of the county of —, viz: [*give names of jurors.*] I fixed the time and place of the meeting of the jury for the — day of —,

18—, at — o'clock A. M., on the premises described in the writ, and on the — day of —, 18—, notified the plaintiff and defendant of the time and place of meeting by serving them with a written notice, a copy of which is hereto attached [*or if served on the attorney or by publication show the facts*].

That the jury met at the time and place above stated, and after being duly sworn proceeded to inspect said premises [and the lands owned by all of the defendants above and below the proposed dam], and having heard the evidence, returned their inquest, which is hereto attached.

That the plaintiff and — and — were present at said examination, but the defendant, —, was not present, either in person or by attorney. —, Sheriff — County.

Dated this — day of —, 18—.

1. What return must show. R. S. 1881, § 895; ante, vol. 2, § 1302; Indiana, etc., Ry. Co. v. Allen, 100 Ind. 409.

757.—Answer of defendant, land-owner.

[*Caption.*]

The defendant, for answer to the application, and as against the inquest of the jury herein, alleges:

1. That he denies each and every allegation of said application and the findings of the jury in said inquest.

2. That he is the owner of the following described real estate: [*describe it*] [*or, the real estate described in said application as belonging to him*], on the water-course named in said application; that the same is located on the border of said stream about — above the proposed dam, is low agricultural land, unprotected by any embankment; that there are improvements thereon as follows: [*describe them*]; that by the construction of said dam the waters of said stream will be raised — feet opposite defendant's said property, and will overflow the same to a depth of — feet, the dwelling-house and out-houses thereon will be rendered useless, and — acres of said ground will be entirely submerged, to defendant's damage — dollars [*or state the facts showing any other damage to property, and allege the amount of damages*].

—, Attorney for Defendant.

1. What may be pleaded as a defense and how. R. S. 1881, §§ 896, 908; ante, vol. 2, § 1304.

758.—Judgment.

— }
 v. } Judgment.
 — }

Come the parties, and this cause being submitted to the court on the pleadings and the inquest of the jury herein, and the court having heard the evidence, and being fully advised in the premises, confirms said inquest, and renders judgment for defendant for the amount of damages assessed by the jury [*or, sets aside said inquest on the ground that the damages assessed thereby are too small (excessive), and assesses the damages of defendant at — dollars*].

It is therefore considered and adjudged by the court that [said inquest be and the same is hereby confirmed and that] the defendant recover of the plaintiff the sum of — dollars as damages, together with his costs and charges in this proceeding laid out and expended.

It is further considered and adjudged that the real estate described in the inquest of the jury, to wit: [*describe it*], be and the same is hereby set off to the plaintiff, to be used by him in the erection of an abutment for the proposed dam [*or state any other use for which it is claimed*], upon payment of the damages assessed in favor of the defendant.

1. What judgment may be rendered. R. S. 1881, § 897.

For practice generally in the assessment of damages, see vol. 2, §§ 1298, 1308.

759.—Instrument of appropriation under section 3907 Revised Statutes, 1881.

The — Railway Company }
 v. } Instrument of Appropriation.
 — }

The — Railway Company, a corporation organized under the general laws of the State of Indiana, do hereby signify and give notice of the desire and intention of said company to enter upon, use, hold, and appropriate the fee-simple interest in the following real estate in the county of —, State of Indiana: [*describe the land appropriated particularly.*]

That said real estate is necessary for the use of said company for its road-way, side-tracks, and connections [*or state other use*], in the construction of its road from — to —, known as the — railway.

That — is the owner [in fee-simple] of said real estate.

[That said company has been unable to agree with said — for the purchase thereof at any price.]

—, Attorney for the — Railway Company.

1. What instrument of appropriation must contain. R. S. 1881, 3907; ante, vol. 2, § 1299; *Swinney v. The Ft. Wayne, etc., R. R. Co.*, 59 Ind. 205.

760.—Notice to be indorsed on instrument of appropriation.

The within named — is hereby notified that on the — day of —, 18—, the within named railroad company will, at — o'clock A. M. of said day, make application to the — Circuit Court for the appointment of appraisers to assess the damages that will result to you from the appropriation of the lands in said instrument described, by said company. —, Attorney for the — Railway Company.

Dated this — day of —, 18—.

1. Is this notice necessary? The statute does not in terms require that any notice of the application for the appointment of the appraisers shall be given, but it is certainly an important omission that should be supplied in every case by giving the notice.

761.—Proof of notice to land-owner.

State of Indiana, — County, ss.

—, being duly sworn, says: I served the within instrument and the notice indorsed thereon on the within named —, by delivering to him [to —, guardian of said —] true copies thereof, on the — day of —, 18—, at —.

[*Jurat.*]

[*Signature.*]

1. Notice, how given. Notice to the land-owner, if within the county, is given by delivering to him a copy of the instrument of appropriation. If the owner is incapable of contracting with reference to the damages service must be made upon his guardian. If the owner is a non-resident of the county, or his residence is unknown, notice may be given by publication, setting out the substance of the instrument of appropriation. R. S. 1881, § 3907; ante, vol. 2, § 1302.

762.—Warrant appointing appraisers.

The — Railway Company	}	Order Appointing Appraisers.
v.		
—		

The — Railway Company having, on the — day of —, 18—, deposited with the clerk of this court its instrument of appropriation

of the following lands of — : [*describe them*], for the roadway of its railroad [*or state other use, as stated in the instrument of appropriation*], and it appearing to the court by the affidavit of — [*or state other proof of service*] that said instrument and notice of this application indorsed thereon were duly served on said —, on the — day of —, 18—, by [*state how served*].

Therefore, on the application of said railway company [*or, said — (naming land-owner)*], it is ordered by the court that —, —, and —, three disinterested freeholders of the county of —, be and they are hereby appointed appraisers to assess the damages which said — may sustain by said appropriation, and that after being sworn as provided by law, they proceed to assess said damages and return their award thereof to the clerk of this court forthwith.

In testimony whereof, I, —, judge of the said — Circuit Court, have hereunto set my hand, this — day of —, 18—.

—, Judge of the — Circuit Court.

Witness the clerk and the seal of said court, hereto attached, this — day of —, 18—.

[SEAL.]

—, Clerk of the — Circuit Court.

763.—Oath of appraisers indorsed on warrant.

We do solemnly swear that we will honestly, fairly, and impartially assess the damages which — will sustain by the appropriation of the real estate described in the within warrant for the purposes therein named.

[Signatures.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk of the — Circuit Court.

764.—Award of damages.

The — Railway Company }
v. — } Award of Damages.

We, the undersigned, appraisers appointed by the — Circuit Court to assess the damages of — by the appropriation of the real estate of said —, described in the warrant of our appointment herein, by the — railway company, for the purposes named in said warrant, find that said real estate is of the value of — dollars, and that said — will be damaged by said appropriation in the sum of — dollars, and we assess his damages at said sum.

Dated this — day of —, 18.

—, }
—, } Appraisers.
—, }

1. What award should contain. R. S. 1881, § 3907.

2. What should be considered in assessing damages. R. S. 1881, § 3907, and cases cited in note; ante, vol. 2, § 1303; *The Union R. R. Transfer, etc., Co. v. Moore*, 80 Ind. 458; *Indiana, etc., Ry. Co. v. Allen*, 100 Ind. 409; *Terre Haute, etc., R. R. Co. v. Crawford*, 100 Ind. 550.

765.—Exceptions to award.

State of Indiana, ——— County.

In the ——— Circuit Court, ——— Term, 18—.

The ——— Railway Company	}	Exceptions to Award.
v. ———		

The above named plaintiff, the ——— railroad company, hereby excepts to the award of the appraisers herein on the following grounds:

1. The damages assessed by said appraisers are excessive [*state any other grounds affecting the validity of the proceedings or the amount of the damages*].

Wherefore, said company prays the court that said award be set aside, and that new appraisers may be appointed by the court to make said appraisalment [*or, that the amount of damages be assessed by this court*].

———, Attorney for the Plaintiff.

1. What questions may be presented by the exceptions. R. S. 1881, § 3907; ante, vol. 2, § 1304; *Terre Haute, etc., R. R. Co. v. Crawford*, 100 Ind. 550.

2. Exceptions, how tried. Ante, vol. 2, § 1304.

766.—Judgment.

———	}	Judgment.
v. ———		

Come the parties, and this cause being at issue on the instrument of appropriation, the award of the appraisers, and the exceptions of ———, is submitted to the court for hearing, and the court having heard the evidence, and being advised in the premises, overrules said exceptions, to which the said ——— excepts.

It is therefore considered and adjudged by the court that said award of the appraisers be and the same is hereby in all things confirmed, and that the said ——— recover of the ——— railway company the sum of ——— dollars, assessed by said appraisers, together with his costs in this proceeding laid out and expended.

[*Or, if the exceptions are sustained, say: The court having heard the evidence, and being sufficiently advised in the premises, sustains the*

(—, —, and —) exceptions of said — to said award (and the proceedings herein), to which the said railway company excepts.]

It is therefore considered and adjudged by the court that said award be and the same is hereby set aside [and that —, —, and —, disinterested freeholders of the county of —, be and they are hereby appointed appraisers to make a reappraisement of the damages of said —, which will accrue to him by reason of the appropriation of the real estate described in the instrument of appropriation herein, for the uses and purposes therein named, and that they make and return their award of said damages to this court forthwith.]

[Or, instead of referring the matter back to new appraisers, say: And the court finds that the said — will be damaged by the appropriation of the real estate described in the instrument of appropriation, to wit: (*describe it*), for the purposes named in said instrument, in the sum of — dollars.

It is therefore considered and adjudged by the court that the said — recover of said — the sum of — dollars as damages and his costs in this proceeding laid out and expended.]

1. What judgment may be rendered. R. S. 1881, § 3907; ante, vol. 2, § 1305; Lake Erie, etc., Ry. Co. v. Kinsey, 87 Ind. 514; Terre Haute, etc., R. R. Co. v. Crawford, 100 Ind. 550.

6. ATTACHMENT AND GARNISHMENT.

767.—Affidavit.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Affidavit in Attachment.
— }

—, being duly sworn, says he is the [agent for, and makes this affidavit on behalf of, the] plaintiff in the above entitled cause.

That the plaintiff's cause of action herein is for [*state what, e. g.*] money due him from the defendant on a promissory note, executed by defendant to plaintiff, a copy of which is filed with the complaint.

That the plaintiff's claim is just.

That he believes the plaintiff ought to recover thereon the sum of — dollars.

That the defendant is a non-resident of the State of Indiana [*or state any other of the causes for an attachment enumerated in section 913 of the Revised Statutes of 1881*].

[*Jurat.*]

[*Signature.*]

1. What sufficient affidavit. R. S. 1881, § 916; ante, vol. 2, § 1311; *The Fremont Cultivator Co. v. Fulton*, 103 Ind. 393.

768.—Undertaking and approval.

[*Caption.*]

We undertake that the plaintiff in the above entitled cause will duly prosecute his proceeding in attachment therein, and will pay all damages which may be sustained by the defendant if the proceedings of the plaintiff shall be wrongful and oppressive. [Signatures.]

Approved by me, this — day of —, 18—

—, Clerk of the — Circuit Court.

Form of undertaking. R. S. 1881, § 917; ante, vol. 2, § 1312.

769.—Order of attachment.

[*Caption.*]

The State of Indiana to the Sheriff of — County :

You are commanded to seize and take into your possession the personal property and real estate of the defendant in your county not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff in this action, for the sum of — dollars, together with the costs of the action, and return this order, with your proceedings thereon, when fully executed or discharged.

Witness, the clerk of the — Circuit Court, at —, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

See R. S. 1881, § 918; ante, vol. 2, § 1313.

770.—Sheriff's return indorsed on order of attachment.

Came to hand — —, 18—, at — o'clock — M.

By virtue of the within order of attachment, I have attached and taken into my possession — [*describe the property taken particularly*], and have, with the assistance of —, a credible and disinterested householder of the county of —, caused the same to be inventoried and appraised, as shown by the inventory and appraisement attached to and made a part of this return. —, Sheriff of — County.

Dated this — day of —, 18—.

1. What return should show. R. S. 1881, § 921; ante, vol. 2, § 1313.

771.—Inventory and appraisement.

[Caption.]

Inventory and appraisement of property taken under the order of attachment issued in the above cause and attached hereto, by the undersigned, sheriff of — county, with the assistance of —, a disinterested and credible householder of said county, to wit:

1 horse, \$—

1 cow, —

The S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section —, township —, range —, in — county, State of Indiana, \$—

[Itemize each article or tract of personal or real property, and set the appraised value opposite each.]

Witness our hands, this — day of —, 18—.

—, Sheriff — County.

—.

1. How inventoried and appraised. R. S. 1881, § 921; ante, vol. 2, § 1315.

772.—Delivery bond.

[Caption.]

Whereas, —, sheriff of the county of —, State of Indiana, has levied upon certain personal property of the above named defendant, to wit: [*describe it*], by virtue of an order of attachment in this cause,* and has delivered the same to said defendant:

Now, therefore, we undertake to the plaintiff that the defendant shall properly keep and take care of said property, and shall deliver the same to said sheriff on demand, or so much thereof as may be required to be sold on execution to satisfy any judgment which may be rendered against the defendant in this action [*or, that he will pay the appraised value of the said property not exceeding the amount of any judgment the plaintiff may recover and costs*].

Dated this — day of —, 18—.

[Signatures.]

Approved by me, this — day of —, 18—.

—, Sheriff — County.

1. What bond should contain. R. S. 1881, § 924; ante, vol. 2, § 1316; vol. 3, pp. 108, 109.

773.—Restitution bond.

[Follow Form 771 to *, and continue:] Now, therefore, we undertake to the said plaintiff that the defendant will appear to said action and perform the judgment of the court therein.

Dated this — day of —, 18—.

[Signatures.]

Approved by me, this — day of —, 18—.

—, Sheriff — County
[or, Judge, or, Clerk of the — Circuit Court].

1. Form of restitution bond. R. S. 1881, § 928; ante, vol. 2, § 1317; vol. 3, pp. 109, 110.

774.—Affidavit for garnishment.

[Caption.]

—, being duly sworn, says he is the [agent (attorney) of the] plaintiff in the above entitled cause.

That he has good reason to believe, and does believe, that one — [or, if a corporation, designate it by its corporate name], of and within said county of —, has property of said defendant in his [its] possession [or, is indebted to the defendant], [or, has the control and agency of property, moneys, credits, and effects of said defendant], [or, the defendant owns certain shares of stock in the —, a corporation organized under the laws of the State of Indiana, which the sheriff can not attach by virtue of the order of attachment herein.]

[Signature.]

Subscribed and sworn to before me this — day of —, 18—.

1. What affidavit against garnishee must contain. R. S. 1881, § 931; ante, vol. 2, § 1319; *Field v. Malone*, 102 Ind. 251.

775.—Motion to quash writ.

[Caption.]

The defendant hereby enters his special appearance herein for that purpose, and moves the court to quash the writ of attachment herein on the following grounds:

1. The affidavit in attachment is insufficient, in this: [state in what it is insufficient; state any other grounds affecting the validity of the writ.]

—, Attorney for Defendant.

1. Particularity required in setting out objections. *The Fremont Cultivator Co. v. Fulton*, 103 Ind. 393.

For further forms affecting proceedings in attachment and garnishment, see COMPLAINT, pp. 106–110; ANSWER, pp. 344–346; JUDGMENTS, pp. 448–452; ORDERS AND RECORD ENTRIES, p. 610.

For the practice generally, see vol. 2, §§ 1309–1338.

7. ATTORNEYS AT LAW.

776.—Oath of attorney.

I, —, do solemnly swear that I will support the constitution of the United States and of the State of Indiana, and that I will faithfully and honestly discharge the duties of an attorney at law.

[*Jurat.*]

[*Signature.*]

1. Should be entered on the order book. R. S. 1881, § 965.

777.—Affidavit in support of motion to require attorney to show his authority to appear.

[*Title of court and cause.*]

—, being duly sworn, says he is the plaintiff in the above entitled cause; that —, an attorney of this court, is appearing in this action, and has filed an answer, for the defendant; and that this affiant believes, and has reason to believe, that he is so appearing without employment by the defendant or other authority.

[*Jurat.*]

[*Signature.*]

1. How attorney's authority may be questioned. R. S. 1881, § 970; ante, vol. 2, § 1343; Indiana, etc., Ry. Co. v. Maddy, 103 Ind. 200.

778.—Order to show authority.

— } Order requiring — to show his authority to appear as
v. } Attorney for Defendant.

Comes the plaintiff, and moves the court for an order requiring —, an attorney of this court, to show by what authority he appears in this action as the attorney for the defendant, and in support of said motion files and presents his own affidavit; and said motion being submitted to the court is sustained.

It is therefore ordered by the court that said — be and he is hereby required to show to this court by what authority, if any, he appears in this action as the attorney for the defendant, and until such showing all further proceedings herein by him, as such attorney, are hereby stayed.

1. How authority shown. Ante, vol. 2, § 1343; Hughes v. Osborn, 42 Ind. 450.

779.—Notice of attorney's lien for his fee indorsed on the judgment.

Notice is hereby given that I intend to hold a lien on the subjoined judgment for — dollars, the amount of my fee as attorney for the plaintiff [defendant] in the cause in which said judgment was rendered.

Dated this — day of —, 18—.

[Signature.]

1. How lien of attorney secured. R. S. 1881, § 5276; ante, vol. 2, § 1345.

2. Effect of entering lien. Ante, vol. 1, § 662; vol. 2, § 1345; Puett v. Beard, 86 Ind. 172; Adams v. Lee, 82 Ind. 587.

780.—Proceedings to suspend or disbar—Order of court directing accusation.

In the Matter of Charges }
 against —, an At- } Order directing — to Prefer Charges.
 torney of this Court. }

It being represented to the court that —, an attorney of this court, has been guilty of a violation of his duties as such attorney, it is ordered by the court that —, an attorney of this court, be, and he hereby is, appointed to, and is directed, to draw up and prosecute charges against said —, and that said accusation be presented to this court without delay.

1. Court may direct filing of accusation. R. S. 1881, § 976; ante, vol. 2, § 1347.

781.—Complaint by attorney appointed by the court.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
 v. } Complaint.
 — }

—, an attorney of the — Circuit Court, in pursuance of an order of said court, heretofore made, directing him to draw up and prosecute an accusation against the above named —, complains of said —, and alleges:

That said — is an attorney at law, duly admitted to practice as such in all the courts of the State of Indiana.

That he was, on the — day of —, 18—, convicted by the — Circuit Court of the State of Indiana of the crime of — [some crime amounting to a felony or a misdemeanor, involving moral turpitude].

That he was, on the — day of —, 18—, guilty of disobedience [a violation] of an order of this court, in this: [*state the facts as to the making of the order and the acts constituting disobedience or a violation thereof.*]

That he has been guilty of a willful violation of his duties as an attorney of this court, in this: [*state particularly the facts showing the violation of duty.*]

Wherefore, he prays the court that said — be removed and disbarred from practicing as an attorney in any of the courts of this state.

[*Signature.*]

State of Indiana, — County.

—, being duly sworn, says that the foregoing accusation against — is true in substance and in fact, as he verily believes.

[*Signature.*]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

1. What sufficient accusation. R. S. 1881, §§ 967, 973; ante, vol. 2, §§ 1346, 1347.

782.—Motion by individual for suspension.

[*Title of court and cause.*]

— respectfully shows to the court that the above named — is an attorney at law, duly admitted to practice in all of the courts of this state.

That on the — day of —, 18—, this plaintiff employed said —, as such attorney at law, to collect for him a sum of money then due him from one —, and to bring suit therefor, if necessary; and said — accepted said employment, and afterward, as such attorney, collected from said — by [without] suit the sum of — dollars.

That he is entitled to — dollars of said sum, and no more, as his fee for collecting the same.

That this plaintiff has at various times [*or, on the — day of —, 18—*] demanded of said — the payment of said sum so collected, less his fee for collecting the same, but he has failed to pay the same or any part of it.

Wherefore, the plaintiff moves the court for an order requiring said — to pay over said sum of — dollars, or show cause why he should not be punished for contempt; that plaintiff have judgment against him for — dollars and ten per cent damages thereon, and that he be suspended from practice, as such attorney, for such time as may to the court seem proper.

[*Signature.*]

State of Indiana, — county.

—, being duly sworn, says the facts stated in the foregoing motion are true, as he verily believes.

[*Jurat.*]

[*Signature.*]

1. Who may make motion and for what causes. The statute speaks of an *accusation* and a *motion*. R. S. 1881, § 976. And also, under section 974, of a *complaint* or *motion* by the aggrieved party where the attorney has failed, on request, to pay over money or deliver up papers. R. S. 1881, §§ 974, 975.

The complaint would seem to be a proper pleading to file in either case. All that is necessary is that it should contain the material facts. It does not matter by what name it may be called.

As to what are sufficient grounds for the motion or complaint, see R. S. 1881, §§ 973, 974, 975; ante, vol. 2, § 1347.

783.—Notice.

State of Indiana, — County.

— Circuit Court, — Term, 18—.

 } Notice of Filing of Motion [Complaint] to Suspend from
v. } Practice and for Judgment.
 }

The above named — is hereby notified that said — has filed in the — Circuit Court his motion [complaint] alleging [*state the material facts contained in the motion or complaint*], and praying that you be suspended [disbarred] from the practice as an attorney at law, and that said — have judgment against you for — dollars and ten per cent damages thereon.

You are further notified to appear and show cause why [you should not be punished for contempt and be suspended (disbarred) from the practice, and why] judgment should not be rendered against you, as prayed for.

Witness my hand and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk of the — Circuit Court.

1. What notice must be given and for how long. The statute is very indefinite as to the manner of giving the notice or by whom it shall be given. It provides for the motion, complaint, or accusation, and that “after five days’ notice of the *filing* the attorney shall be bound to appear and plead to the same or suffer judgment by default.” This requires nothing more than that the attorney should be notified of the filing of the charges against him; and if he fails to appear and plead, at the expiration of five days from the service of such notice, judgment may be rendered against him by default. R. S. 1881, § 976.

But he can not be suspended from the practice without the necessary charges being filed and notice thereof being given. Ante vol. 2, § 1347, and cases cited.

As the notice is of the filing of the charges in court, it would seem to be proper that the notice should be given by the clerk.

Under section 974 the proceeding is by motion, and must be upon "reasonable notice." R. S. 1881, § 974.

The better practice under this section would be for the court to fix the time for which notice shall be given, and require, by its order, that the attorney appear and show cause at the expiration of the time fixed. And notice may properly be given by service of a copy of the order to show cause.

784.—Order to show cause, and for notice, under sec. 974.

[Caption.]

Whereas, — has filed in this court his motion to suspend —, an attorney of this court, from the practice, and for judgment against him for moneys collected by said — and not paid over, and stating therein [*set out the material allegations of the motion*].

Now, therefore, it is ordered by the court that said —, within — days after the service upon him of a copy of this order, appear and show cause, if any he have, why he should not be suspended from the practice as an attorney, and judgment be rendered against him as prayed for in said motion.

It is further ordered that a certified copy of this order be issued, by the clerk of this court, and that the same be served upon said —, by the sheriff, forthwith, and that he make return of his doings to this court without delay.

See note to Form 783 as to the manner of giving notice.

785.—Judgment disbaring or suspending attorney.

— } Judgment.
v. }
— }

Come the parties, and this cause is submitted to the court without the intervention of a jury, and the court having heard the evidence, and being fully advised in the premises, finds [*state briefly what is found as to the misconduct of the attorney, and, if judgment for money is prayed for, the amount due; or show a submission to a jury and the return of the verdict*].

It is therefore considered and adjudged by the court that the defendant be and he is hereby forever disbarred [suspended for — years] from practicing as an attorney at law in any of the courts of this state.

It is further considered and adjudged by the court that the plaintiff

recover of the defendant the sum of — dollars, and ten per cent damages thereon, in all the sum of — dollars, together with his costs and charges herein laid out and expended, collectible without relief from valuation or appraisement laws.

1. What judgment may be rendered. R. S. 1881, §§ 975, 977; ante, vol. 2, § 1349.

2. What courts have jurisdiction of the proceeding. R. S. 1881, § 973; ante, vol. 2, § 1347; *Heffren v. Jayne*, 39 Ind. 463; *Mattler v. Schaffner*, 53 Ind. 245; *Garrigus v. The State*, 93 Ind. 239.

3. Motion to reinstate. No formal motion to reinstate an attorney is necessary. The motion may be oral, as in case of a motion for admission in the first instance; and any person may resist his readmission and make proof of any facts tending to show his unfitness without any pleadings. R. S. 1881, § 977; ante, vol. 2, § 1351; *Ex parte Walls*, 73 Ind. 95.

For further forms affecting attorneys, see COMPLAINT—MALPRACTICE, p. 214.

For the rights and duties of attorneys and the practice generally, see vol. 2, §§ 1339–1351.

8. BASTARDY.

786.—Complaint.

State of Indiana, County of —.

Before —, a Justice of the Peace in and for — Township.

The State on the Relation of — }
v. } Complaint.
— }

— complains of —, and says that she is pregnant with [was on the — day of —, 18—, delivered of] a bastard child [which is now living], and that — is the father of said child. [*Signature.*]

Subscribed and sworn to before me, this — day of —, 18—.

—, Justice of the Peace.

1. What sufficient complaint. R. S. 1881, §§ 978, 980; ante, vol. 2, § 1352; *Schroeder's McDonald*, 364.

787.—Warrant.

State of Indiana, — County.

To any Constable of — County:

You are commanded to arrest —, and bring him forthwith before me to answer the complaint of —, wherein she claims, under oath, that she is pregnant with a bastard child [*or*, wherein she claims,

under oath, that on the — day of —, 18—, she was delivered of a bastard child, which is now living], and that said — is the father of said child. And have you then and there this writ.

Given under my hand and seal, this — day of —, 18—.

—, Justice of the Peace. [SEAL.]

788.—Deposition of prosecuting witness.

[Caption.]

Deposition of —.

The said — being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

1st Question. What is your name, age, and place of residence?

Answer. —.

2d Question. State whether or not you are pregnant with a bastard child [or, whether or not you have been delivered of a bastard child. If so, state when and whether said child is living or dead].

Answer. —.

3d Question. Who is the father of said child?

Answer. —.

Cross-examination by Defendant.

1st Question, etc

[Signature.]

1. Written examination may be waived. Ante, vol. 2, § 1355; *Unrah v. The State ex rel.*, etc., 4 N. E. Rep. 453.

789.—Bond.

We, — and —, are bound unto the State of Indiana in the sum of — dollars, on this condition :

On the — day of —, 18—, — filed with —, a justice of the peace of — township, — county, Indiana, her verified complaint, charging that she was pregnant with [had been delivered of] a bastard child, and that said — was the father of said child, upon which complaint said — was duly arrested, tried, and adjudged to be the father of said child, by said justice of the peace, as charged, and required to give bond for his appearance in the — Circuit Court.

Now, therefore, if the said — shall be and appear before the — Circuit Court of the State of Indiana, at —, on the first day of the next term thereof, to answer said charge and abide the decision of the court in the premises, and not depart hence without leave, or pay

such sums of money and to such persons as may be adjudged by said court, this bond to be void, else in force.

Witness our hands and seals, this — day of —, 18—.

— [SEAL.]

— [SEAL.]

Approved by me, this — day of —, 18—.

—, Justice of the Peace.

790.—Mittimus.

State of Indiana, — County.

The State of Indiana to the Keeper of the Jail of said County:

Upon the complaint of —, made under oath, and due examination had, I have adjudged that —, herewith sent, is the father of a bastard child, with which said — is pregnant [of which said — has been delivered], and have ordered that he give bond in the sum of — dollars, which he has failed and refused* to do.

Therefore you are commanded to receive said — into your custody, and confine him in said jail until discharged by due process of law.

Witness my hand and seal, this — day of —, 18—.

—, Justice of the Peace. [SEAL.]

791.—Docket entries—Judgment—Transcript and certificate.

The State of Indiana on the Relation of —	} Bastardy.
<u>v.</u> —	

On the — day of —, 18—, — filed her complaint as follows: [copy it.]

On same day I issued and delivered to —, constable, a warrant as follows: [*here insert.*]

On the — day of —, 18—, —, constable, returned said warrant, with his return indorsed thereon, as follows: [copy it], and with him came said — [or, but said — came not].

On said day [or, the — day of —, 18—] said cause came on for examination, said — appearing in person and by —, his attorney [or, said — not appearing], and said — gave her deposition in writing as follows: [*here insert*], and that being all the evidence [further evidence being heard], I find the facts stated in said complaint are true.

It is therefore ordered and adjudged that the defendant, —, is the father of said child, and that he give bond in the sum of — dollars

for his appearance at the next term of the — Circuit Court of the State of Indiana, at —, to answer said complaint of —, and not depart without leave, and abide the judgment and orders of the court or pay such sums of money and to such persons as may be adjudged by said court.

Thereupon said —, with — and — as his sureties, gave bond as follows: [*here insert.*]

[*Or*, Thereupon said —, failing and refusing to give bond, I issued a mittimus to —, constable, for his commitment to the county jail of — county. —, Justice of the Peace. [SEAL.]

The State of Indiana, — County.

I hereby certify that the foregoing is a full, true, and complete copy of all papers filed and docket entries made by me in the case of the State of Indiana on the Relation of — v. —.

Witness my hand and seal, this — day of —, 18—.

—, Justice of the Peace. [SEAL.]

1. Transcript, how made and certified. The transcript is made by copying the record entries as above, and should be certified as in the foregoing form.

792.—Answer of defendant in Circuit Court.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

The State of Indiana on the Relation of —	} Answer.
v.	
—	

The defendant, for answer to the complaint, alleges:

1. That he denies each and every allegation thereof.
2. That on the — day of —, 18—, and before the birth of the child mentioned in the complaint, he and the relatrix were duly married at —. [*state any other defenses.*]

Wherefore, he demands judgment.

—, Attorney for Defendant.

1. What must be pleaded and in which court. R. S. 1881, § 990; ante, vol. 2, § 1353.

793.—Judgment in Circuit Court.

—	} Judgment.
v.	
—	

Come the parties, and this cause is submitted to the court without the intervention of a jury, and the court having heard the evidence

and argument of counsel, finds that the allegations of the complaint are true; that the relatrix is pregnant with [was on the — day of —, 18—, delivered of] a bastard child, and that the defendant is the father of said child.

[*Or, if the trial is by jury, say:* And this cause having been submitted to a jury for trial, the jury returns into court the following verdict: [*copy it*], and the court renders judgment on said verdict.]

It is therefore considered and adjudged by the court that the relatrix is pregnant with [was on the — day of —, 18—, delivered of] a bastard child, and that the defendant is the father of said child.

It is further considered and adjudged by the court that the plaintiff recover of the defendant the sum of — dollars for the maintenance of said child, to be paid to said relatrix [*or some other person may be named*] in installments as follows: — dollars on or before the — day of —, 18—; — dollars on or before the — day of —, 18—, and — dollars on or before the — day of —, 18—, and that the plaintiff recover of the defendant the plaintiff's costs and charges in this behalf laid out and expended.

It is further considered and adjudged by the court that the defendant replevy this judgment by good and sufficient freehold surety, or upon default thereof that he be imprisoned in the county jail until the same is paid or replevied or until released by due process of law.

1. What judgment may be rendered. R. S. 1881, §§ 991, 992; ante, vol. 1, § 1007; vol. 2, § 1358.

For practice generally in bastardy proceedings, see ante, vol. 2, §§ 1352-1366.

9. BONDS AND UNDERTAKINGS.

See APPEALS, p. 484; ARBITRATION AND AWARD, p. 510; ARREST AND BAIL, p. 514; ATTACHMENT AND GARNISHMENT, pp. 526, 527; BASTARDY, p. 535; COMPLAINT, pp. 66-121; COSTS, p. 541; EXECUTIONS, p. 580; INJUNCTIONS, p. 593; NEW TRIAL, p. 435; PARTITION, p. 626; RECEIVER, p. 631; REMOVAL OF CAUSES, p. 505; REPLEVIN, p. 636; REPLEVIN BAIL, p. 637.

10. CHANGE OF NAME.**794.—Petition.**

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

In re Change of }
 Name of — } Petition.

To the Honorable the — Circuit Court :

Your petitioner, —, respectfully prays the court that his [her]
 name be changed to —. [Signature.]

795.—Notice.

Notice is hereby given that I have filed in the office of the clerk of
 the — Circuit Court my petition for the change of my name to —.

Dated this — day of —, 18—. [Signature.]

1. What notice necessary. R. S. 1881, § 1002; ante, vol. 2, § 1368.

796.—Proof of publication of notice.

—, being sworn, says that the notice of the application of — to
 the — Circuit Court, for change of name, hereto attached, was pub-
 lished in the —, a newspaper of general circulation, printed and
 published at —, in the county of —, State of Indiana, on the
 — day of —, 18—; the — day of —, 18—, and the —
 day of —, 18—, and that he is a person disinterested in said appli-
 cation. [Signature.]

[Jurat.]

[Attach printed copy of notice.]

1. Proof of publication, how made. R. S. 1881, § 1003; ante, vol.
 2, § 1368.

797.—Decree changing name of person.

[Title.]

Comes the petitioner [by his attorney, —], and his petition herein
 coming on to be heard, and the court being advised in the premises,
 finds for the petitioner that there exists proper and reasonable cause
 for changing his [her] name as prayed for, and that due notice of the
 application and the filing of said petition has been given by three
 weekly publications in the —, a newspaper of general circulation,
 printed and published at —, in the county of —, the last of which
 publications was made more than thirty days before the first day of
 the present term of this court.

It is therefore considered and adjudged by the court that the name of the petitioner, —, be and it hereby is changed to —, as prayed for in said petition.

It is further ordered that the petitioner pay the costs of this proceeding.

798.—Decree changing name of corporation.

[Title.]

Come the directors of the —, a corporation duly organized under the general laws of the State of Indiana, and present their petition for a change of the name of said corporation to —.

And it appearing to the court that notice of said application has been given by three weekly publications in the —, a newspaper of general circulation, printed and published at —, the last of which publications was made more than thirty days before the first day of the present term of this court, and that good reasons exist for changing the name of said corporation, as prayed for.

It is therefore ordered and decreed by the court that the name of said corporation, the —, be and it hereby is changed to —.

It is further ordered that the petitioners pay the costs of this proceeding.

1. What order may be made. R. S. 1881, § 1003; ante, vol. 2, § 1369.

II. CHANGE OF VENUE.

799.—Affidavit for change from county.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Affidavit for Change of Venue.

—, being duly sworn, says he is the plaintiff [defendant] in the above entitled cause, and that he can not have a fair and impartial trial thereof in the county of —, for the reasons:

1. That the defendant [plaintiff] has an undue influence over the citizens of said county.

2. That an odium attaches to the plaintiff [defendant] in said county, on account of local prejudice.

3. That an odium attaches to the plaintiff's cause of action [defendant's defense] in said county, on account of local prejudice.

4. That the said county of — is a party plaintiff [defendant] to the action.

5. That all the parties and witnesses in the action reside in — county [near the line of — county], and nearer to the county seat thereof than to the county seat of — county, and their attendance can be procured at the trial in said county at less expense than in this, and the convenience of parties and witnesses and the ends of justice would be promoted by a trial of the action in said county of —.

[*Jurat.*]

[*Signature.*]

1. **What sufficient affidavit.** R. S. 1881, § 412; ante, vol. 2, § 1261.

800.—Affidavit for change from judge.

[*Caption.*]

—, being duly sworn, says he is the defendant [plaintiff] in the above entitled cause, and that he can not have a fair and impartial trial thereof before the Honorable —, Judge of the — Circuit Court, for the following reasons:

1. Said judge is interested in the result of this cause as follows: [*state the particulars.*]

2. Said judge was, before his election [appointment] as such judge, engaged as counsel for the plaintiff [defendant].

3. Said judge is of kin to the plaintiff [defendant], being his [*state the relationship.*].

4. Said judge is a material witness in the cause for this defendant [plaintiff].

5. On account of the bias and prejudice of said judge against the defendant [plaintiff], which bias and prejudice this affiant says exists.

[*Jurat.*]

[*Signature.*]

1. **What sufficient affidavit.** R. S. 1881, § 412; ante, vol. 2, § 1268.

2. **Effect of affidavit on jurisdiction of court.** Ante, vol. 2, § 1269.

3. **Effect of rules of court.** Ante, vol. 2, § 1273; *Riggenbery v. Hartman*, 102 Ind. 537.

801.—Notice of application in vacation.

[*Caption.*]

The plaintiff [defendant] will take notice that at the chambers of the Honorable —, Judge of the — Circuit Court, at —, on the — day of —, 18—, at — o'clock — M. the defendant [plaintiff]

iff] will move said judge for an order in vacation, changing the venue of this cause from the county of — [from said judge].

[Proof of service.]

—, Attorney for —.

1. When notice necessary. R. S. 1881, § 417; ante, vol. 2, § 1266.

802.—Order granting change from county.

— }
v. } Order Granting Change of Venue.
— }

Come the parties, and the plaintiff [defendant] on his affidavit filed moves the court for a change of venue from the county, which motion the court sustains, and it is ordered that the venue of this cause be changed to — county, and that plaintiff [defendant] pay the cost of such change within — days.

803.—Order granting change from judge.

— }
v. } Order Granting Change from Judge.
— }

Come the parties, and the plaintiff, on his affidavit heretofore [now] filed, moves the court for a change of venue from the judge of this court, which motion is sustained, and this cause is set down for trial on the — day of —, 18—, before —, to which the defendant excepts, and — days' time is given him in which to file a bill of exceptions.

804.—Clerk's certificate to transcript on change of venue.

State of Indiana, — County.

I, —, clerk of the — Circuit Court, hereby certify that the foregoing — pages contain a full, true, and complete transcript of the entries made in the case of — v. —, and that the papers forwarded therewith are the papers on file therein in my office, as follows: [*name the original papers forwarded with the transcript*].

Witness my hand and the seal of the — Circuit Court, this — day of —, 18—.

[SEAL.]

—, Clerk of the — Circuit Court.

1. Transcript, how made up. Ante, vol. 2, § 1265.

805.—Receipt of clerk of court to which papers are sent.

[*Caption.*]

—, clerk of the — Circuit Court, has this day deposited, and I have filed, in my office his certified transcript of all entries made in said cause in said court and the following original papers in the cause:

[*name them.*] —, Clerk of the — Circuit Court.

Dated this — day of —, 18—.

For the practice generally, see vol. 2, §§ 1260–1274.

12. CONTEMPTS OF COURT.

806.—Judgment of conviction for direct contempt.

In the Matter of the alleged }
Contempt of —. } Judgment.

The said — being present in court, the court makes the following statement as to his alleged contempt of this court: [*set out particularly the acts or words complained of by the court as constituting the contempt.*]

And the said —, in his defense, makes the following statement: [*set out the defendant's statement in defense or extenuation.*]

From which the court finds that said — is guilty of a contempt of this court, as set out in said statement of the court.

It is therefore considered and adjudged by the court that the said — pay to the State of Indiana a fine of — dollars, and that he be imprisoned in the county jail for the term of — days, to which the defendant excepts.

1. Direct contempt, how charged. No complaint or affidavit is necessary in case of a direct contempt. But the court, as a basis for the proceeding, must state the facts complained of, and the statement must be reduced to writing and incorporated in the judgment. And the defendant must be permitted to make a statement of his defense or any facts in extenuation, which must also be reduced to writing and set out in the judgment. R. S. 1881, § 1011; ante, vol. 2, § 1873.

807.—Order on motion to reconsider and for new trial.

[*Title as above.*]

Comes —, and moves the court to reconsider its action, by which he was, on the — day of —, 18—, convicted of a contempt of this court, and for a new trial, and in support of said motion submits the affidavits of —, —, and —, who were present in court at the time of said alleged contempt.

And it appearing to the court that —, —, and — were also present at said time, it is ordered by the court that the affidavits of said parties be also taken, which is done, and said affidavits are also submitted.

And the court having seen and examined said affidavits, and further considered the statement of the court, heretofore made, and the defendant's statement in answer thereto, overrules said motion, and denies the defendant a new trial, to which the defendant excepts, and the defendant is given — days in which to prepare and file his bill of exceptions.

1. Proceedings on motion for a rehearing. R. S. 1881, § 1011; ante, vol. 2, § 1374.

808.—Charge of indirect contempt—Information.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

The State of Indiana }
v. }

Information for Contempt of Court.

— gives the court to understand and be informed that on the — day of —, 18—, at —, in the county of —, State of Indiana, while the — Circuit Court was in session at —, and the trial of an action wherein — was plaintiff and — was defendant. of which said court had jurisdiction, was on trial [before a jury], — did willfully, knowingly, and corruptly [*state particularly the acts constituting the contempt*].

[Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk of the — Circuit Court.

1. How indirect contempt must be charged. R. S. 1881, § 1012; ante, vol. 2, § 1375; *Worland v. The State*, 82 Ind. 49.

809.—Rule to show cause.

[Title.]

— having this day filed in this court his information [affidavit], from which it appears that —, on the — day of —, 18—, at —, in the county of —, State of Indiana, while this court was in session at —, and the trial of an action wherein — was plaintiff and — was defendant, of which this court had jurisdiction, was on trial, did willfully, knowingly, and corruptly [*set out particularly the acts as charged in the information or affidavit*].

It is therefore ordered by the court that said — be and appear in

this court at —, on the — day of —, 18—, at — o'clock — M. to show cause, if any he may have, why he should not be attached and punished for a contempt of this court.

Witness my hand and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk of the — Circuit Court.

1. What rule to show cause must contain. R. S. 1881, § 1012; ante, vol. 2, § 1375; *Worland v. The State*, 82 Ind. 49.

810.—Sheriff's return on rule to show cause.

Came to hand —, —, 18—. Served by leaving with the within named — the original order, of which the within is a true copy, on the — day of —, 18—, at —, in the county of —, State of Indiana. —, Sheriff — County.

811.—Answer to rule to show cause.

[Caption.]

The defendant, for answer to the rule to show cause herein, alleges:

1. That he denies each and every allegation contained in said rule, and in the information [affidavit] of —, on which the same was issued.

2. [*State any matter showing that the facts, if true, do not constitute a contempt or matter in confession and avoidance of the facts.*]

Wherefore, he asks that he be acquitted and discharged.

[Verification.]

[Signature.]

1. What may be shown by answer and its effect. R. S. 1881, § 1013; ante, vol. 2, § 1376.

812.—Attachment.

The State of Indiana, — County, ss.

The State of Indiana to the Sheriff of — County:

You are hereby commanded to attach the body of —, so that you have him instanter before the judge of the — Circuit Court, now in session, to answer for a contempt of said court [in disobeying the process thereof], and have you then and there this writ.

By order of the court.

Witness, —, clerk, and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk.

813.—Judgment.

[Title.]

Come the parties, and said — files his answer herein [denying the allegations of the return and affidavit], as follows: [*here insert*], and it appearing therefrom that said — has not been guilty of a contempt of this court, it is considered and adjudged by the court that he be acquitted and discharged.

[Or, It appearing to the court that said — has been duly served with the rule to show cause herein, on the — day of —, 18—, and said — having failed to appear or answer said rule, it is ordered by the court that he be forthwith attached for contempt.]

[Or, Come the parties, and — having filed his answer to the return herein, and the court having considered the same, and the information [affidavit] and return herein, finds that said — has been guilty of a contempt of this court as charged.

It is therefore considered and adjudged by the court that said — pay to the State of Indiana a fine of — dollars, and that he be committed to the county jail until said fine and the costs of this proceeding are paid or replevied [*or, that he be imprisoned in the county jail of — county for the term of — months*].

[Or, And it appearing to the court that said — has in his possession the following papers belonging to the files of this court [*describe them particularly*], and that he refuses to deliver them up, it is ordered and adjudged by the court that said — be imprisoned in the county jail of the county of — until said papers are produced and delivered in this court, or until the further order of this court], to which the defendant excepts, and — days' time is given him in which to prepare and file his bill of exceptions.]

1. What order of commitment should contain. Ante, vol. 2, § 1379.

2. Appeal, how taken. Ante, vol. 2, § 1378.

3. What will amount to a contempt. Ante, vol. 2, § 1371; *Worland v. The State*, 82 Ind. 49; *Little v. The State*, 90 Ind. 338; *Moore's Crim. Law*, § 658.

4. Who may punish for contempt. *Burt v. Pyle*, 89 Ind. 398; *Garrigus v. The State*, 93 Ind. 239.

For the practice generally in cases of contempt, see ante, vol. 2, §§ 1371–1379.

13. CONTINUANCE.

814.—Affidavit for a continuance.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
 v. } Affidavit for a Continuance.
 — }

— being duly sworn, says that he is the plaintiff [defendant] in the above entitled cause.

That he can not try this action at the present term of this court on account of the absence of —, a competent witness in his behalf [whose evidence is material to the issues in the cause].

That said witness resides at —, in the county of —, State of Indiana.

That he is now at —.

That he believes, if said witness were present, he would testify to the following facts: [*state them particularly.*]

That he believes said facts to be true.

That he is unable to prove said facts by any other witness whose testimony can be as readily procured.

That the absence of said witness has not been procured by the act or connivance of this plaintiff [defendant], nor by any other person at his request, nor with his knowledge or consent.

That on the — day of —, 18—, he caused a subpoena to be issued for said witness, and placed in the hands of the sheriff of this county to be served.

That up to the time of the issuing of said subpoena this affiant did not know of the absence of said witness.

That on the — day of —, 18—, the sheriff returned said subpoena not found, and this affiant then learned of the absence of the witness for the first time, and too late to procure his evidence at the present term of this court [*or show service of the subpoena in time and his failure to attend*].

That he believes the testimony of said witness can be procured at the next term of this court.

[*Verification.*]

[*Signature.*]

1. What affidavit must contain. R. S. 1881, § 410; ante, vol. 1, §§ 739–746; *Miller v. Harker*, 96 Ind. 234; *Belck v. Belck*, 97 Ind. 73; *Eslinger v. East*, 100 Ind. 434; *McDermott v. The State*, 89 Ind. 187; *Hutts v. Shoaf*, 88

Ind. 395; *Marks v. The State*, 101 Ind. 353; *The Carthage Tp. Co. v. Andrews*, 102 Ind. 138; *McBride v. Stradley*, 103 Ind. 465; *Morris v. The State*, 4 N. E. Rep. 148.

815.—Order granting continuance.

— }
v. } Continuance.
— }

Come the parties, and the plaintiff [defendant] moves the court for a continuance of this cause until the next term of this court [a postponement of the trial of this cause until a later day in the term], and in support of his motion files his own affidavit.

And the court having seen and examined said affidavit, sustains said motion, to which the defendant [plaintiff] excepts.

It is therefore ordered that this cause be and the same hereby is continued until the next term [the — day of the present term] of this court [at the cost of the plaintiff (defendant)].

816.—Admission that witness will testify to facts stated in affidavit—Order overruling motion for continuance.

— }
v. } Motion for Continuance Overruled.
— }

Come the parties, and the plaintiff [defendant] moves the court for a continuance of this cause until the next term of this court, and in support thereof files and submits his own affidavit. Whereupon the defendant [plaintiff] admits that the witness, —, named in said affidavit, would, if present, testify to the facts stated in said affidavit as true [or, *if the absent evidence is documentary or the cause is a criminal one, say*: consents that the evidence set out in said affidavit shall be taken on the trial as true].

And the court, by reason of said admission, overrules said motion for a continuance, to which the defendant [plaintiff] excepts.

1. What must be admitted to avoid a continuance. R. S. 1881, §§ 410, 1781; ante, vol. 1, § 747.

For the practice generally in applications for a continuance, see ante, vol. 1, §§ 703, 708, 738-756.

14. COSTS.

817.—Affidavit for security for costs.

[Caption.]

— being duly sworn, on his oath says he is the defendant in this action, and that the plaintiff is a non-resident of the State of Indiana.

[Jurat.]

[Signature.]

818.—Rule on plaintiff for cost bond.

[Title.]

Come the parties, and upon motion of the defendant, supported by affidavit of the non-residency of the plaintiff, the plaintiff is required to file his undertaking, with sufficient surety for costs, on or before the — day of the present term of this court.

819.—Cost bond.

[Caption.]

We undertake that the plaintiff shall pay to the defendant all costs that may accrue in this action to any officer or person.

Dated this — day of —, 18—.

[Signatures.]

Approved by me, this — day of —, 18—.

—, Clerk of the — Circuit Court.

1. When security for costs may be required and how. R. S. 1881, § 589; ante, vol. 1, § 1028; *The State v. Roche*, 91 Ind. 406.

2. What costs secured by bond. Ante, pp. 110, 111.

15. DEFAULT.

820.—Motion to set aside default.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— } Affidavit in Support of Motion to Set Aside Default.
v. }

The above named defendant, —, moves the court to set aside the default taken against him and the judgment rendered thereon, and as grounds for this motion shows to the court:

That judgment was taken against him in this court, in favor of plaintiff, by default, for — dollars, on the — day of —, 18—.

That said default and judgment was taken against him through his mistake [inadvertence] [excusable neglect], in this: [*state fully and*

particularly the facts showing a sufficient reason for not appearing to make a defense, as in Form 249, p. 186.]

That he has a valid and meritorious defense, in this: [*state fully the defense.*]
[*Signature.*]

State of Indiana, County of —.

The above named — being duly sworn, says that the facts stated in the foregoing motion are true.
[*Signature.*]

Subscribed and sworn to before me, this — day of —, 18—.
—, Clerk of the — Circuit Court.

1. What motion must contain. R. S. 1881, § 396; ante, vol. 1, § 462; vol. 3, pp. 186, 187.

2. Sheriff's return, how far may be contradicted. Ante, vol. 1, § 244; vol. 2, § 1186; *Nichols v. Nichols*, 96 Ind. 433; *Neitert v. Trentman*, 4 N. E. Rep. 306.

821.—Order setting aside default and vacating judgment.

[*Title.*]

Come the parties, and the defendant, —, files his motion to set aside the default heretofore taken against him herein and to vacate the judgment rendered thereon as follows: [*here insert*], and in support of his motion files the affidavits of — and —.

And the plaintiff files the affidavits of — and — in opposition to said motion.

And said motion being submitted to the court on the facts stated therein, and said affidavits, and the court being sufficiently advised in the premises, sustains the same, to which the plaintiff excepts.

It is therefore ordered and adjudged by the court that the default heretofore taken against the defendant, —, be and the same hereby is set aside, and that the judgment rendered against him thereon by this court, on the — day of —, 18—, be and the same hereby is vacated and set aside.

It is further ordered and adjudged that the said defendant pay the costs in this action accrued to this time [the costs of this motion].

For practice generally in proceedings to set aside defaults, see vol. 1, §§ 460–468; ante, p. 186.

16. DISMISSAL.

822.—Dismissal by plaintiff in vacation.

[Caption.]

The plaintiff in the above entitled cause hereby dismisses the same.

[Signature.]

1. When and how plaintiff may dismiss. R. S. 1881, §§ 333, 334; ante, vol. 1, §§ 831, 832; *McClelland v. The Louisville, etc., Ry. Co.*, 94 Ind. 276.

823.—Entry of dismissal in vacation.

[Title.]

The plaintiff in this cause this day files his dismissal thereof as follows: [*copy dismissal filed.*]

1. Must be entered of record. R. S. 1881, § 334; ante, vol. 1, § 832.

824.—Notice to defendant of dismissal in vacation.

[Caption.]

The defendant in the above entitled cause is hereby notified that the plaintiff has dismissed the same by a written dismissal thereof, filed in the office of the clerk of the — Circuit Court.

Dated this — day of —, 18—.

[Signature.]

1. Effect of notice. R. S. 1881, § 334.

825.—Judgment on dismissal in vacation.

[Title.]

It appearing to the court that the plaintiff has, since the last term of this court, filed in the clerk's office his written dismissal thereof, it is considered and adjudged that said cause be and the same hereby is dismissed, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended.

826.—Dismissal by the court.

[Title.]

Comes the defendant, but the plaintiff, being three times called in open court, comes not, and makes default.

[Or, Come the parties, and this court having, on the — day of the present term, ordered that — and — be made parties herein, and the plaintiff having refused to make them parties to the action.]

[Or, It appearing to the court (by the affidavits of — and —)]

that the plaintiff is wrongfully failing to prosecute this action with diligence against the defendants, — and —, but is prosecuting the same against the other defendants.]

[*Or show the disobedience of the plaintiff of any other order of the court.*]

Therefore, on motion of the defendants [— and —], it is ordered that this cause be dismissed.

It is therefore considered and adjudged by the court that this cause be and the same hereby is dismissed, and that the defendant recover of the plaintiff his costs and charges in this cause laid out and expended.

1. On what grounds court may dismiss. R. S. 1881, § 333; ante, vol. 1, §§ 831, 833; *Fitch v. Citizens' Nat'l Bank of Greensburgh*, 97 Ind. 211.

827.—Dismissal by agreement—Entry.

[*Title.*]

Come the parties, and in open court agree that this cause be dismissed at the costs of the defendant [*or, file in open court their agreement dismissing this action as follows: [here insert agreement.]*]

It is therefore considered and adjudged by the court that this cause be and the same hereby is dismissed, and that the plaintiff recover of the defendant his costs and charges in this behalf laid out and expended [*or render judgment in accordance with the written agreement filed.*]

1. Effect of dismissal. R. S. 1881, § 333; ante, vol. 1, §§ 831, 833; *Kitts v. Willson*, 89 Ind. 95.

828.—Motion by defendant to dismiss.

[*Caption.*]

The defendant moves the court to dismiss this action on the following grounds:

1. The court has not jurisdiction of the subject-matter of the action.
2. [*State any other reasons.*] —, Attorney for Defendant.

1. Effect of joint motion where part only are entitled to dismissal. *State v. Cunningham*, 100 Ind. 461.

See APPEALS, p. 496.

17. DIVORCE AND ALIMONY.

See COMPLAINT, pp. 145–147; ANSWER, p. 361; JUDGMENT, p. 452.

829.—Affidavit for order requiring plaintiff to pay attorney's fees and alimony.

State of Indiana, County of ——.
 In the — Circuit Court, — Term, 18—.

— }
 v. } Affidavit.
 — }

— being duly sworn, says that she is the defendant in the above cause; that she has no property or means of any kind with which to make her defense in this action.

That the plaintiff is the owner of real and personal property of the value of — dollars, and is amply able to furnish her such means.

That she has a valid and meritorious defense to the action [and a good and meritorious cause for divorce from the plaintiff].

Wherefore, she prays the court for an order requiring the plaintiff to pay into court for her use a sum sufficient to pay attorneys' fees and other necessary expenses in making her defense [and prosecuting her cause of action against the plaintiff].

[*Jurat.*]

[*Signature.*]

830.—Notice of application for allowance.

[*Caption.*]

The plaintiff in the above entitled cause is hereby notified that on the — day of —, 18—, at — o'clock — M., the defendant will, at the court room in —, apply to the — Circuit Court [or, will at the chambers of the judge of the — Circuit Court, at —, apply to said judge] for an order requiring the plaintiff to pay into court, for her use, money sufficient with which to pay her attorneys and make her defense.

[*Signature.*]

831.—Order requiring payment of money by plaintiff.

— }
 v. } Order.
 — }

Come the parties, and the defendant moves the court for an order requiring plaintiff to pay into court, for her use, money sufficient with which to pay her attorneys and make her defense [and prosecute her cross-petition] herein, and in support of her motion files her own affidavit.

And the plaintiff, in opposition to said motion, files the affidavits of — and —.

And the court, having seen and examined said affidavits, and being advised in the premises, orders that the plaintiff pay to the clerk of this court, for the use of the defendant in making her defense [and prosecuting her cross-petition] herein the sum of — dollars within — days.

1. When court may make order for allowance. R. S. 1881, § 1042; ante, vol. 2, § 1890.

832.—Affidavit for injunction against disposing of property and for alimony pendente lite.

[*Caption.*]

— being duly sworn, says she is the defendant in the above entitled cause.

That the plaintiff is the owner of a large amount of property, consisting of [*state what*].

That this defendant has no means with which to support herself or her children.

That she has — children, aged —, —, and — years respectively, the fruits of her marriage with the plaintiff, who have no property and are entirely dependent on her for their support.

That the plaintiff has entirely abandoned her and her said children, and refuses to contribute any thing toward her or their support, although he is amply able to do so.

That she has a good and meritorious defense to the plaintiff's action, in this: [*state briefly*], and is entitled to a divorce from him on the grounds alleged in her cross-petition herein and to a judgment for alimony.

That the plaintiff is threatening to convey away his said property for the purpose of preventing her from collecting any judgment she may recover in the action for alimony and the support of their said children, and will do so unless enjoined by this court.

Wherefore, she asks that the plaintiff be enjoined from selling, conveying, or in any way disposing of his said property, or any part of it, until the final determination of this action, and that the plaintiff be required to pay her a sufficient sum for her maintenance during the pendency of this action and for the maintenance of their said children.

[*Jurat.*]

[*Signature.*]

833.—Order for payment of alimony and for an injunction.

— }
v. } Order for Alimony and Injunction.
 — }

Come the parties, and the plaintiff [defendant] moves the court for an order enjoining the defendant [plaintiff] from selling, conveying, or in any way disposing of his property during the pendency of this action, and for an allowance for the maintenance of herself and children, and in support thereof files and submits the affidavits of —.

And the defendant [plaintiff] files and submits, in opposition to said motion, the affidavits of —.

And the court, having examined said affidavits, and being advised in the premises, it is ordered that the plaintiff [defendant] be allowed the sum of — dollars per month for the support and maintenance of herself [and minor children] during the pendency of this action, and that the defendant [plaintiff] pay to her or —, her attorney, the sum of — dollars immediately upon [*or, within — days after*] the service of this order, and the sum of — dollars on the first day of each and every month thereafter during the continuance of this action.

It is further ordered that the defendant [plaintiff] be and he hereby is enjoined from selling, conveying, or in any way disposing of any of his property [except —] during the pendency of this action or until the further order of the court.

834.—Order for custody of children.

[*Title.*]

On motion of the plaintiff [defendant], it is ordered that he [she] have the care, custody, and education of the children of the parties hereto, to wit: [*name them*] until the further order of the court. But that said children shall not be taken from — without permission of the court, and the defendant [plaintiff] shall be permitted to visit said children at the home of plaintiff [defendant] twice each week, on — and —, between the hours of — and —, but at all other times he [she] is enjoined from interfering in any manner with either of said children.

835.—Application to open up and vacate judgment rendered on constructive notice.

[*Caption of original case.*]

—, the defendant in the above cause, respectfully shows to the court that by the judgment of this court, rendered therein on the —

day of —, 18—, it was adjudged [*set out the substance of the judgment as to the divorce, custody of the children, etc.*]

That no summons was ever served on this defendant in said cause and no notice given except by publication.

That this defendant received no actual notice of the pendency of said action in time to appear in court at the time of the trial and object to said judgment.

And this defendant prays the court that said judgment [so far as it relates to the care, support, and custody of said children] be opened up, and that he be allowed to defend the same on the following grounds: [*state the causes relied upon for opening up the judgment.*]

[*Signature.*]

836.—Affidavit to accompany application.

[*Caption.*]

— being duly sworn, says he [she] is the defendant in the above entitled cause.

That he [she] received no actual notice of the pendency of said action in time to appear in court at the time of the trial thereof and object to said judgment.

[*Jurat.*]

[*Signature.*]

1. When affidavit necessary and what must contain. R. S. 1881, § 1030; ante, vol. 2, § 1393.

18. DRAINAGE.

837.—Petition to Circuit Court.

State of Indiana, County of —.

To the Honorable the — Circuit Court:

Your petitioner respectfully represents to the court that he is the owner in fee-simple of the following described real estate in the county of —, State of Indiana: [*describe it.*]

That said real estate would be benefited by drainage, which can not be accomplished in the best and cheapest manner without affecting the lands of others.

That he believes the following lands in said county, owned by the persons named, will be affected by said proposed drainage:

[*Describe in tracts of forty acres, according to fractions of government surveys, or less tracts when they exist, and in Clark's grant and the French grant and in all pre-emptions of Indiana reservation in such tracts as are owned, e. g.*]

NAMES OF OWNERS.	DESCRIPTION OF LANDS.
John Jones,	N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ Sec. —, T. —, R. — W.
William Williams, . . .	S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Sec. —, T. —, R. — W.
Unknown owner,	N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. —, T. —, R. — W.
— Railroad Company,	Right of way through Sec. —, T. —, R. — W.

That your petitioner believes that the public health will be improved [or, that the public highway leading from — to —, and known as the — road (— and — streets, in the city of —) will be benefited by said proposed drainage] [or, the proposed drainage will be a work of public utility].

That it is believed the proposed drainage can be accomplished in the cheapest and best manner by [*state how, and in so doing describe particularly the starting point, terminus, course, and distance of the proposed drain*].

That your petitioner believes that the costs, damages, and expenses of said proposed drainage will be less than the benefits which will result therefrom to the owners of the lands likely to be benefited thereby.

Wherefore, your petitioner asks that said ditch [drain] be established as provided by law. [Signature.]

State of Indiana, — County.

— being duly sworn, says he is the petitioner [one of the petitioners] whose name[s] appear to the foregoing petition, and that the matters stated in said petition are true, as he verily believes.

[Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

838.—Indorsement on petition of time of docketing.

The within named petitioner hereby fixes the — day of —, 18—, as the day for docketing the within petition. [Signature.]

1. What petition must contain. Acts 1885, pp. 130, 131, §§ 2, 3; *Corey v. Swagger*, 74 Ind. 211; *Coolman v. Fleming*, 82 Ind. 117; *Shields v. McMahan*, 101 Ind. 591; *Troyer v. Dyar*, 102 Ind. 396.

2. Petition may be amended. *Coolman v. Fleming*, 82 Ind. 117; *Williams v. Stevenson*, 103 Ind. 243.

3. Indorsement of time of docketing. Acts 1885, p. 131, § 3; *Smith v. Smith*, 97 Ind. 273; *Carr v. The State*, 103 Ind. 548.

4. Drainage in cities—City authorities have exclusive jurisdiction. *Anderson v. Endicutt*, 101 Ind. 539.

5. How petition verified Acts, 1885, p. 130, § 2; *Shields v. McMahan*, 101 Ind. 591; *Updegraff v. Palmer*, 6 N. E. Rep. 353.

839.—Notice of filing and docketing of petition.

To —:

You are hereby notified that I [we] have filed in the office of the clerk of the — Circuit Court, at —, my [our] petition for the drainage of my [our] real estate, described as follows: [*describe real estate of petitioner*], and to establish a ditch [drain] as follows: Commencing [*describe the ditch or drain as proposed in the petition*], passing through the lands of [*name the owners of lands through which the ditch or drain will pass, as in the petition*], and alleging that real estate owned by you, described as follows: [*describe it as in the petition*] will be affected thereby. Said petition is docketed for hearing in said court on the — day of —, 18—.

Dated this — day of —, 18—.

[Signature.]

1. What sufficient notice. Acts 1885, p. 131, § 3; *Vizzard v. Taylor*, 97 Ind. 90; *Carr v. The State*, 103 Ind. 548; *Indianapolis, etc., Gravel R. Co. v. The State*, 4 N. E. Rep. 316; *Young v. Wells*, 97 Ind. 410, 414; *Meranda v. Spurlin*, 100 Ind. 380; *Jackson v. The State*, 104 Ind. 516; *Carr v. Boone*, 6 N. E. Rep. 626; *McMullen v. The State*, 4 N. E. Rep. 903.

2. Notice necessary to jurisdiction. That some notice shall be given is necessary to the jurisdiction of the court; but the fact that the notice given is defective does not affect the jurisdiction, and is not ground for collateral attack. *Carr v. Boone*, 6 N. E. Rep. 626; *Vizzard v. Taylor*, 97 Ind. 90; *Jackson v. The State*, 104 Ind. 516; *Pickering v. The State*, 6 N. E. Rep. 611.

But a merely defective notice may be attacked on appeal. *Carr v. Boone*, 6 N. E. Rep. 626.

And where the court exercises acts of jurisdiction it will be conclusively presumed, against a collateral attack, it being a court of general jurisdiction, that the necessary notice was given, unless it appears otherwise on the face of the record. *Young v. Wells*, 97 Ind. 410; *Jackson v. The State*, 104 Ind. 516; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Jackson v. Dyer*, 3 N. E. Rep. 863; *Indianapolis, etc., Gravel R. Co. v. The State*, 4 N. E. Rep. 316; *Pickering v. The State*, 6 N. E. Rep. 611; *Updegraff v. Palmer*, 6 N. E. Rep. 353.

It has been held that by a failure to make any one of the persons through whose lands the drain will run a party, by notice or otherwise, the whole proceeding must fail. *Wright v. Wilson*, 95 Ind. 408.

But it is held in a later case that a party properly notified can not take advantage of the failure to give notice to another party against whom an assessment is made, "*unless it be shown that the failure to give such notice will prevent the construction of the ditch.*" *Grimes v. Coe*, 102 Ind. 406.

840.—Proof of service of notice—Affidavit.

State of Indiana, County of —.

— being duly sworn, says he served the within notice on the within named — by reading the same to him and in his presence [or, by leaving a true copy thereof at his last and usual place of residence] on the — day of —, 18—.

[*Jurat.*]

[*Signature.*]

841.—Proof of notice to non-resident land-owners—Posting.

State of Indiana, County of —.

— being duly sworn, says that on the — day of —, 18—, he posted written [printed] copies of the notice hereto annexed [within notice] at three public places in the townships of — and —, in said county [*naming townships in which the real estate described in the petition is situate*], and near the line of the proposed ditch [drain], as described in the petition named in said notice, as follows: One at —, one at —, one at —, and one at the door of the court-house of said county of —, at —.

[*Jurat.*]

[*Signature.*]

1. Notice, how served and by whom. Acts 1885, p. 131, § 3.

2. Proof of service, how may be made. *Meranda v. Spurlin*, 100 Ind. 380.

3. Notice to non-residents, how given and proved. Acts, 1885, p. 131, § 3.

4. What sufficient proof of service. *Williams v. Stevenson*, 103 Ind. 243.

5. Appearance waives notice. *Wright v. Wilson*, 95 Ind. 408; *Updegraff v. Palmer*, 6 N. E. Rep. 353; *Sunier v. Miller*, 4 N. E. Rep. 867.

842.—Order docketing petition.

In the Matter of the Petition
of — for the Establish-
ment of a Drain. } Order Docketing Petition.

Comes the petitioner, and it appearing to the court by his indorsement on the petition that the docketing thereof was fixed for to-day;

And it further appearing by the affidavit of —, which affidavit is as follows: [*here insert*] that all persons named in the petition as the owners of real estate to be affected by said proposed drain [ditch]

have been duly served with notice of the filing of said petition and of the time of docketing the same :

It is therefore ordered by the court that said petition be placed on the docket of this court as an action pending herein.

1. When court to order docketing. Acts 1885, p. 131, § 3.

2. Recitals in order as to giving of notice, effect of. It is not necessary that the order should recite the fact that notice has been given, as it will be presumed. But it is better that it should be done. *Smith v. Smith*, 97 Ind. 273. And when the order shows that the proper notice has been given, the recital is conclusive, as to the parties, where the jurisdiction of the court is collaterally attacked. Ante, vol. 1, §§ 5, 6, 1038; *Young v. Wells*, 97 Ind. 410; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Carr v. The State*, 103 Ind. 548; *McMullen v. The State*, 4 N. E. Rep. 903; *Updegraff v. Palmer*, 6 N. E. Rep. 353; *Jackson v. The State*, 104 Ind. 516.

It is otherwise as to persons not made parties to the petition. *Young v. Wells*, 97 Ind. 410.

And an appeal is a direct attack, and if the notice is not such as the statute requires the objection will prevail. *Carr v. Boone*, 6 N. E. Rep. 626.

843.—Objection to petition—Motion to dismiss.

In the Matter of the Petition of	}	Objection and Motion to Dismiss
— to Establish a Drain.		

—, one of the land-owners named in the petition herein, objects to the petition, and moves the court to dismiss the same, on the following grounds :

1. The same does not describe the lands through which the proposed drain will pass.

2. The method by which it is believed the proposed drainage can be accomplished in the cheapest and best manner is not stated [*state any other causes*].

[*Signature.*]

1. How sufficiency of petition may be tested. The statute provides for a demurrer, remonstrance, or objection to the petition, and that if the court finds the petition defective it shall *dismiss* the same unless amended. Acts 1885, pp. 130, 132.

2. When objection must be made. The objection must be made within ten days or it is waived. Acts 1885, p. 132; *Updegraff v. Palmer*, 6 N. E. Rep. 353.

3. Objections must be specifically stated. *Updegraff v. Palmer*, 6 N. E. Rep. 353.

4. Remonstrance by two-thirds of resident land-owners, effect of. It is provided that if two-thirds in number of the land-owners named as such in the petition, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of the drain or ditch, it shall be dismissed. Acts 1885, p. 132.

844.—Objection to drainage commissioner.

[*Title.*]

—, one of the land-owners named in the petition herein, objects to Drainage Commissioner — acting as such in this matter on the following grounds:

1. He is interested in the matter in controversy herein, in this: [*state particularly in what his interest consists.*]

2. He is of kin to —, one of the parties to be affected by this proceeding, being [*state how he is related.*] [Signature.]

1. When, how, and on what ground objection may be made. Acts 1885, p. 132.

845.—Order overruling objections referring to drainage commissioner and appointing third commissioner.

[*Title.*]

Come the parties [*or, if any of the parties have not appeared, state the facts*], and the objections of — to the petition herein, and his motion to dismiss the same, are overruled, to which said — excepts.

And the objection of — to Drainage Commissioner — acting as such herein is also overruled, to which said — excepts.

It is therefore ordered by the court that —, a reputable and disinterested freeholder of — township, — county, be, and he hereby is, appointed a drainage commissioner to act herein.

It is further ordered by the court that the petition herein be, and the same hereby is, referred to —, —, surveyor of the county of —, and the above named —, drainage commissioners herein, and that they meet on the — day of —, 18—, at —, and proceed to perform the duties required of them by law, and that they report their doings to this court on the first day of the next term of this court [*or state other time*].

1. What order of reference must contain. Acts 1885, p. 132.

2. Drainage commissioners, how appointed. Acts 1885, pp. 129, 132, §§ 1, 3.

846.—Bond and oath of drainage commissioner.

The State of Indiana, — county, ss.

We, — and —, are held and firmly bound unto the State of Indiana in the sum of — dollars, to be levied upon our property.

The condition of the above obligation is, that if the said — shall

properly and faithfully discharge his duties as drainage commissioner of said county, and account, according to law, for all money that shall come to his hands as such commissioner, then this bond to be void, else to be and remain in full force. [Signatures.]

Taken and approved by me, this — day of —, 18—. —, Auditor — County.

I, —, being duly sworn, say I will properly and faithfully perform the duties of drainage commissioner of the county of —, and account, according to law, for all money that shall come to my hands as such commissioner.

[Jurat.] [Signature.]

1. What bond shall contain and by whom approved. Acts 1885, p. 129, § 1.

847.—Certified copy of petition and order of reference.

Pleas before the Honorable —, Judge of the — Judicial Circuit of the State of Indiana, and *ex-officio* Judge of the — Circuit Court:

[Title.]

Be it remembered, that on the — day of —, 18—, the following petition was filed in the office of the clerk of said court: [*copy petition in full.*]

And afterward, on the — day of —, 18—, the same being the — juridical day of the — term, 18—, of said court, the following proceedings were had in the matter of said petition: [*copy the order of reference to the commissioners.*]

State of Indiana, — County, ss.

I, —, clerk of the — Circuit Court in and for said county and state, hereby certify the above and foregoing to be true and complete copies of the petition and order of court in said cause, as the same appear of record and on file in my office.

Witness my name and the seal of said court, this — day of —, 18—.

[SEAL.] —, Clerk.

1. Certified copy of petition and order must issue to commissioners. Acts, 1885, p. 132.

848.—Report of commissioners.

[Title.]

We, the undersigned, drainage commissioners, respectfully report to the court that, as directed by the order of this court, a certified copy of which is hereto attached, we met at —, on the — day of —, 18—.

That we made personal inspection of the lands described in the petition, a certified copy of which is hereto attached, and of all other lands likely to be affected by the work proposed in said petition, and find :

First. That the drainage proposed in the petition is practicable.

Second. That when accomplished it will improve the public health [benefit the public highway leading from — to —, and known as the — road (— street, in the city (town) of —)] [be of public utility].

Third. That the costs, damages, and expenses of effecting said drainage will be less than the benefits to the owners of the lands likely to be benefited thereby.

Fourth. That the best and cheapest method by which said drainage can be accomplished is by [*state definitely, giving the commencement, termini, route, location, and character of the work, fixing same by metes and bounds, courses, and distances, and description, including grades and bench marks.*]

Fifth. We estimate the cost of said work at — dollars.

Sixth. We divide said drain [ditch] into sections of one hundred feet in length, numbered from — to —, from the commencement to the termini thereof, and compute the number of cubic yards of excavation in each of said sections, respectively, as follows:

No. 1. — cubic yards.

No. 2. — cubic yards.

[Etc., etc.]

Seventh. We assess the benefits to tracts of land that will be affected by said work, and belonging to the parties named, as follows:

NAME OF OWNER.	DESCRIPTION OF LAND.	AM'T OF BENEFITS.
John Jones,	N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, Sec. —, Town —, R. — W.	\$2 50

Eighth. We assess the amount of injury to tracts of lands that will be affected by said work, and belonging to the parties named, as follows :

NAME OF OWNER.	DESCRIPTION OF LAND.	AM'T OF INJURY.
James James,	S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, Sec. —, Town —, R. — W.	\$25 50
— — — —	— — — —	— —

Respectfully submitted.

[Signatures.]

State of Indiana, — County, ss.

We, the undersigned, drainage commissioners, being duly sworn, say that we have each personally examined each tract of land assessed for benefits and injury in the foregoing report and the whole route of the proposed work, and that the assessments made therein are correct, just, fair, and equitable to all parties concerned; that no other lands will be benefited or injured by said work, and that the foregoing report is true in substance and in fact.

[Signatures.]

Subscribed and sworn to before me, this — day of —, 18—. —, Clerk — Circuit Court.

1. What report must contain. By the act of April 8, 1881, forms of reports were enacted. R. S. 1881, § 4284.

This act has been repealed. Acts 1885, p. 143, § 13. Therefore we have no enacted forms. But the act repealed and the act of 1885, so far as the requirements as to the report are concerned, are the same in substance, except that in addition to the facts required to be found by the act of 1881, the act of 1885 requires the fixing of grades and bench marks, the division of the work into sections, and that the amount of excavation to each section shall be stated. R. S. 1881, § 4275; Supl. R. S. 1881, § 7059; Acts 1885, p. 132; *Meranda v. Spurlin*, 100 Ind. 380; *Roberts v. Gierss*, 101 Ind. 408; *Grimes v. Coe*, 102 Ind. 406; *Ross v. Davis*, 97 Ind. 79.

2. What benefits to lands should be included in assessments. *Lipes v. Hand*, 104 Ind. 503.

3. Effect of report—On what questions conclusive. *Anderson v. Baker*, 98 Ind. 587; *Indianapolis, etc., Gravel R. Co. v. The State*, 4 N. E. Rep. 316.

849.—Remonstrance after filing of report.

[Caption.]

—, one of the land-owners named in the [petition and] report of the drainage commissioners herein, and whose lands will be affected by

the proposed work as therein named, respectfully remonstrates against said report on the following grounds :

First. The said report is not according to law, in this : [*state specifically in what respect it is not according to law.*]

Second. The benefits assessed against the following tract of land [owned by this remonstrant] are exorbitant.

Third. That the lands of this remonstrant, as described in said report [or, if any particular tract, describe it], are [is] assessed too much, as compared with the lands of — and —, described in said report [or, if claimed to be too high, as compared with any particular tract, describe it].

Fourth. The lands of — [or describe any particular tract], described in said report, are [is] assessed too low, according to the benefits to be received thereby from said proposed work.

Fifth. The lands of this remonstrant, described in said report [or describe any particular tract], which are [is] assessed as benefited by said proposed work, will not be affected nor benefited by said work [to the extent of the assessment against the same].

Sixth. [*If the remonstrant's lands are assessed as damaged.*] The damages assessed to the lands of this remonstrant, as described in said report [or to any particular tract, describing it], are inadequate.

Seventh. The lands of this remonstrant, described in said report [or any particular tract, describing it], reported as benefited by said proposed work, will be damaged thereby [in the sum of — dollars].

Eighth. It will not be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits to the lands affected thereby.

Ninth. The proposed work will neither improve the public health nor benefit any public highway of the county [or, any street of any city or town in the county], nor be of public utility.

Tenth. The proposed work, as decided upon and reported by the commissioners, will not be sufficient to properly drain the land to be affected thereby. [Signature.]

State of Indiana, — County.

—, being duly sworn, says the facts stated in the foregoing remonstrance are true, as he verily believes. [Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

2. What sufficient remonstrance. Acts 1885, p. 134, § 4; *Higbee v. Peed*, 98 Ind. 420; *Meranda v. Spurlin*, 100 Ind. 380.

3. Must be verified and by whom. Acts 1885, p. 134, § 4; *Morgan Civil Tp. v. Hunt*, 104 Ind. 590; *Munson v. Blake*, 101 Ind. 78.

And the remonstrance can not be amended after the ten days allowed to file the same by adding the verification. *Morgan Civil Tp. v. Hunt*, 104 Ind. 590.

4. Who may remonstrate. Acts 1885, p. 134, § 4; *Reasoner v. Creek*, 101 Ind. 482.

850.—Form of judgment confirming report and assessment and ordering work done.

[*Title.*]

Come the parties, and the court finds against the remonstrants herein, and that the report of the drainage commissioners should be confirmed and the assessments made thereby approved.

It is therefore considered and ordered by the court that the report of the drainage commissioners, made herein, to wit: [*copy it*] be and the same hereby is confirmed; that the assessments made therein be and the same hereby are approved, and that the ditch [drain] therein described be and the same hereby is established.

It is further considered and ordered by the court that the construction of said ditch [drain] and of all work necessary to carry out the recommendations of said report be and the same hereby is assigned to —, one of said drainage commissioners [*or, to —, a disinterested freeholder of the county of —*].

It is further considered and adjudged that the remonstrants pay the costs occasioned by the remonstrance herein, and that all other costs be paid by said —, commissioner, as a part of the expenses of the construction of said ditch [drain].

1. Trial and orders on issues formed by remonstrance. The statute provides that the trial shall be by the court without a jury. Acts 1885, p. 134, § 4. And this has been held to be constitutional. *Anderson v. Caldwell*, 91 Ind. 451; *Ross v. Davis*, 97 Ind. 79.

As to the form of the judgment to be rendered it depends, if in favor of the remonstrants, upon the particular ground of remonstrance upon which it is based, and is specifically provided for by the statute. Acts 1885, pp. 134, 135, § 4.

If the finding is in favor of the report the statute requires that the court shall make an order declaring the proposed work established, and approving the assessments as made by the commissioners, or as equalized and modified by the court, and assigning the work to one of the drainage commissioners, or some disinterested freeholder of the county, for construction. Acts, 1885, p. 135, § 4.

**851.—Assessment by commissioner appointed to construct
[Title.] ditch.**

I, —, drainage commissioner, appointed in the above entitled proceedings to construct a certain ditch in — county, described in the report of the drainage commissioners therein made to the — Circuit Court on the — day of —, 18—, and confirmed by said court on the — day of —, 18—, hereby make the following assessments against the real estate to be affected by said work, the amounts assessed to be paid in — installments of — dollars each, payable on the — day of each and every month, commencing on the — day of —, 18— :

NAMES OF OWNERS.	DESCRIPTION OF PROPERTY.	AMOUNT OF ASSESSMENT.
—	—	—
—	—	—

—, Drainage Commissioner.

1. What amount may be assessed and how. Acts 1885, p. 136, § 5.

852.—Notice of assessment to be filed in recorder's office.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

In the Matter of the Petition of
— for the Establishment
of a Ditch [Drain]. } Notice of Assessment.

Notice is hereby given by the undersigned, a commissioner appointed by the — Circuit Court in the above proceeding, to construct the ditch [drain], hereinafter described, that on the — day of —, 18—, the drainage commissioners in said proceeding returned into said court their report for the establishment of a ditch [drain] as follows: [*describe it*], and their assessments of benefits [and injuries] as follows:

NAMES OF OWNERS.	DESCRIPTIONS OF LANDS.	AMOUNT OF BENEFITS.	AMOUNT OF INJURIES.
—	—	—	—
—	—	—	—

And that said report was, by the order of said court, duly confirmed, said assessment approved, and said ditch [drain] established on the — day of —, 18—. —, Drainage Commissioner.

853.—Notice requiring payment of assessments by installments.

[*Title.*]

Notice is hereby given to all persons against whose lands assessments of benefits have been made by the report of the drainage commissioners, and approved by the court in the above entitled matter, that the undersigned, drainage commissioner of — county, has assessed against their lands the following amounts: [*set out names of parties, description of land, and amount assessed*], and requiring that they pay the same to him at —, in the city of —, county of —, in installments of — dollars per month, the first installment to be paid on or before the — day of —, 18—, and one installment to be paid on the — day of each and every month thereafter until the whole sum so assessed is paid.

You are further notified that if said assessments are not paid at the times above stated, in accordance with said assessment, I will proceed to collect the same according to law.

—, Drainage Commissioner.

Dated this — day of —, 18—.

1. What notice necessary. Acts 1885, p. 137, § 5.

854.—Notice of letting of contracts for construction.

[*Title.*]

Notice is hereby given that from this date until the — day of —, 18—, the undersigned, drainage commissioner, to whom has been assigned the construction of the ditch [drain], described in the report of the drainage commissioners in said matter, will receive bids for the construction of said ditch [drain].

Said work has been divided into stations of one hundred feet in length, and bids for constructing said ditch [drain], or any part of it, must be by such stations.

A computation of the number of cubic yards of excavation in each of said stations has been made, and will be furnished to any person interested or bidding on said work.

Said contract will be let to the lowest and best bidder by stations.

Any person to whom a contract is let will be required to enter into a written contract and give bond, with surety, for the performance of

the work, and that he will pay all damages occasioned by his non-fulfillment of his contract.

The right to reject any and all bids is reserved.

—, Drainage Commissioner.

Dated this — day of —, 18—.

1. Notice, how given. Acts 1885, p 136, § 5.

855.—Contract for construction of work.

This agreement, made and entered into on the — day of —, 18—, by and between —, party of the first part, and —, drainage commissioner of the county of — [or, in the matter of the petition of — for the construction of a ditch [drain] for the purpose of drainage, in the county of —], party of the second part, witnesseth:

That the said — hereby agrees to construct a certain ditch, located in — county, and more fully described in the report of the drainage commissioners in the matter of the petition of —, in the — Circuit Court, for the establishment thereof [and known as the — ditch (drain)] the portion of said ditch included in this contract, being described as follows:

From station — to station —, being — lineal feet.

From station — to station —, being — lineal feet, etc., and being the part of said work let to the party of the first part on the — day of —, 18—.

Said work to be done and performed in all respects according to said report of the drainage commissioners, now on file in the clerk's office of said court.

The said party of the first part hereby agrees to do the said work at the price of — cents per cubic yard, and to fully complete the same by the — day of —, 18—.

This contract is made and the money to pay for said labor is to be collected and paid under the provisions of an act concerning drainage, etc., approved April 6, 1885, which is hereby referred to and made part of this contract; said drainage commissioner acting in an official capacity only.

In witness whereof, the said — and said —, as drainage commissioner of — county, have hereunto set their hands, this — day of —, 18—.

—,

—, Drainage Commissioner.

1. Contract, how let and executed. Acts, 1885, p. 137, § 5.

856.—Bond of contractor. *

Know all men by these presents, That we, — and —, acknowledge ourselves to be indebted and bound unto the State of Indiana in the sum of — dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed and dated this — day of —, 18—.

Conditioned as follows: Whereas, —, drainage commissioner of — county, State of Indiana, has this day let to said — the contract to construct a portion of a certain ditch in said county, which contract is in writing, bearing even date herewith, whereby said — has contracted to construct the following parts of said ditch: [*describe the parts as in the contract*] for the sum of — cents per cubic yard.

Now, if the said — shall fully perform his said contract and pay all damages occasioned by his non-fulfillment thereof, then this obligation to be void; else in full force.

— [SEAL.]

— [SEAL.]

Approved by me, this — day of —, 18—.

— Drainage Commissioner.

1. What bond required. Acts 1885, p. 137, § 5.

857.—Certificate of commissioner to auditor of non-payment of assessments.

To the Auditor of — County:

The undersigned, commissioner of drainage for said county, charged by the order of the — Circuit Court with the construction of a certain ditch [drain] for drainage purposes in said county, hereby certifies that assessments for the construction of said work have been made against lands in said county, as appears below, and owned by the parties named, which assessments have been duly approved by said — Circuit Court, and that the payment thereof, though past due, has not been made, as required by said commissioner:

NAMES OF OWNERS.	DESCRIPTION.	AMOUNT.
—	—	—
—	—	—

—, Drainage Commissioner.

Dated this — day of —, 18—.

1. When commissioner may certify assessment to county auditor. Acts 1885, p. 138, § 5.

858.—Complaint on assessment.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

<p>The State on the Relation of —, Drainage Commissioner of — County, v. —</p>	}	Complaint.
--	---	------------

The plaintiff complains of the defendant, and alleges:

That on the — day of —, 18—, — filed in the clerk's office of the — Circuit Court his [their] petition for the drainage of certain real estate owned by him [them], and for the establishment of a ditch [drain] for that purpose, and for the assessment of the benefits to real estate to be affected thereby, alleging in his [their] said petition, among other things, that the real estate hereinafter described, owned by the defendant, would be affected by said work.

That on the — day of —, 18—, the defendant and all other persons interested in said work, and whose lands would be affected thereby, were duly notified of the filing of the same and of the time the same would be docketed in said court.

That on the — day of —, 18—, said matter was, by order of said court, docketed for hearing.

That on the — day of —, 18—, said matter came on for hearing in said court, and such proceedings were had therein that an order was made referring said matter to — and —, drainage commissioners of said county, and —, appointed by said court, and said commissioners ordered to report on the — day of —, 18—.

That on the — day of —, 18—, said commissioners filed their report in favor of the construction of said work, and their assessment of benefits in the clerk's office of said court, a copy of which assessment is filed herewith and made a part of this complaint, marked Exhibit A, and such proceedings were had that on the — day of —, 18—, said report was, by order of said court, confirmed, said assessments approved, and the construction of said work assigned to this relator, a copy of which order is filed herewith and made a part of this complaint, marked Exhibit B.

That on the — day of —, 18—, the relator, as such commissioner, made an assessment against the lands to be affected by said work, a copy of which is filed herewith and made a part of this complaint, marked Exhibit C, and requiring that the amounts so assessed

be paid in installments of — per cent per month on the — day of each and every month, commencing on the — day of —, 18—.

That he gave notice of said assessment, and of the time and place when the required payments should be made, by publication in the —, a newspaper of general circulation, printed and published at —, in said county.

That no part of said sum assessed against the lands of the defendant has been paid.

That a reasonable fee for plaintiff's attorney in this action is — dollars.

Wherefore, the plaintiff demands judgment for — dollars, for the use of the relator; that the same be declared a lien against the lands of the defendant described in the assessment, made part of this complaint; that said real estate, or so much thereof as may be necessary to pay and satisfy this judgment and costs, be sold as other lands are sold on execution for the satisfaction thereof and for all other proper relief.

—, Attorney for Plaintiff.

1. Necessary allegations. (a.) *Must notice to defendant in original proceeding be averred, and if so, how?* Jackson v. The State, 103 Ind. 250; Wishmier v. The State, 97 Ind. 160; Albertson v. The State, 95 Ind. 370; Jackson v. The State, 104 Ind. 516; Pickering v. The State, 6 N. E. Rep. 611. The cases cited are conflicting. The careful pleader will allege notice in direct terms.

(b.) *Assessment must be made an exhibit.* The assessment creates the lien and is the foundation of the action. Therefore it must be made a part of the complaint. Jewell v. Etchison Ditching Ass'n, 62 Ind. 200; Smith v. Clifford, 83 Ind. 520; Albertson v. The State, 95 Ind. 370; Crist v. The State, 97 Ind. 389; Roberts v. The State, 97 Ind. 399; The State v. Turvey, 99 Ind. 599; The State v. Myers, 100 Ind. 487; Pickering v. The State, 6 N. E. Rep. 611.

Under the act of 1881 it was held that the assessment made by the commissioner charged with the construction of the work was the foundation of the action, and must be set out, and not the original assessment of benefits made in the report of the commissioners. Crist v. The State, 97 Ind. 389; Roberts v. The State, 97 Ind. 399; The State v. Turvey, 99 Ind. 599.

And under the amendment of 1883, which makes the original assessment a lien on the lands, and requires the construction commissioner to file notice of such assessments in the recorder's office of the county, it has been suggested that the original assessment and the order of approval should be set out. Neiman v. The State, 98 Ind. 58.

The acts of 1881 and 1883 require, in express terms, that the construction commissioner should *assess*, from time to time, such sums of the amount assessed by the report of the commissioners as was necessary for the construction of the work. R. S. 1881, § 4277; Sup'l R. S. 1881, § 7061.

The present act provides that he shall *collect* of the benefits assessed a sum sufficient, etc. Acts, 1885, p. 136, § 5.

But while the word "assess" is not used he is required to fix the amount to be paid and give notice of the time and place of the payments in installments, as under the former statute. This being true, the amount fixed by him, and called for in the notice, is the amount he is entitled to recover. But the statute having declared the original assessment to be a lien, it would seem to be the foundation of the action and a necessary part of the complaint.

As the statute and the decisions now stand the only safe way is to set out both of the assessments and the order of the court approving the assessment made by the commissioners. *Neiman v. The State*, 98 Ind. 58; *The State v. Myers*, 100 Ind. 487; *Jackson v. The State*, 103 Ind. 250.

Other proceedings in the cause should not be set out in the complaint, and if they are, can not aid its averments. *Jackson v. The State*, 103 Ind. 250; *Pickering v. The State*, 6 N. E. Rep. 611.

(c.) *Other necessary allegations.* *Wishmier v. The State*, 97 Ind. 160; *Shaw v. The State*, 97 Ind. 23; *Pickering v. The State*, 6 N. E. Rep. 611.

2. Where action must be brought. The action is local and must be brought in the county where the land lies. *Dowden v. The State*, 6 N. E. Rep. 136.

3. What defenses may be made against collection of assessments. Acts 1885, p. 140, § 8; *Anderson v. Baker*, 98 Ind. 587; *McMullen v. The State*, 4 N. E. Rep. 903.

4. Assessments may be collected, by placing same on tax duplicate, without suit. The statute provides for the commissioner certifying the assessment to the auditor (ante, Form 857), and when so certified it is made the duty of the auditor to place it on the delinquent tax duplicate, to be collected as other delinquent taxes are collected, except that no property other than that assessed can be sold. Acts 1885, p. 138, § 5.

The commissioner may take this course, or bring suit, at his option. Acts 1885, p. 138, § 5.

5. Assessments for repairs, how made and collected. Acts 1885, p. 141, § 10.

18. EXECUTIONS.

1. THE WRIT.

859.—Execution on personal judgment.

State of Indiana, — County.

The State of Indiana to the Sheriff of — County :

Whereas, — recovered a judgment against —, on the — day of —, 18—, in the — Circuit Court, for — dollars and — cents, with interest at the rate of — per cent per annum from said date [and — became replevin bail therefor on the — day of —, 18—], upon which there is due — dollars and — cents, principal and interest, and — dollars and — cents costs accrued to this time [all without relief from valuation or appraisement laws].

862.—Venditioni exponas.

State of Indiana, — County, ss.

The State of Indiana to the Sheriff of said County :

Whereas, on the — day of —, 18—, a writ of execution was duly issued by the clerk of the Circuit Court of said county of —, directed to you, commanding you, that of the goods and chattels, lands and tenements of — within your bailiwick, you cause to be made the sum of — dollars and — cents, which — recovered of — in the — Circuit Court by the consideration and judgment thereof, to wit: on the — day of —, 18—, and also the sum of — dollars and — cents, adjudged to the said — for the costs and charges by — about the recovery thereof in that behalf paid, laid out, and expended, all without relief from valuation or appraisement laws, as appears to us of record; and that you have those moneys before the judge of said court, at the clerk's office of said court, in —, according to law, and that you have said writ before said judge, at the clerk's office aforesaid, at the expiration of 180 days from the date of the same.

And whereas, by your return to said writ, it is shown, amongst other things therein, that on the — day of —, 18—, you levied upon and took in execution as the property of the said — the following property: [*describe it*], and that the same remains unsold.

Therefore, you are hereby commanded to proceed to sell the said property so levied upon and remaining unsold, according to the provisions of the statute in such case made and provided, and if the same be insufficient to satisfy said judgment, interest, and costs, then to make the same out of any other property of the debtor subject to execution, and that you have the money arising from such sale before the judge of the said — Court, at the clerk's office, in —, according to law, to satisfy the said judgment, interest thereon, and costs as aforesaid, and that you have this writ before said judge, at the clerk's office aforesaid, at the expiration of 180 days from the date of the same.

In witness of which I, —, clerk of the — Circuit Court, hereunto affix the seal thereof, and subscribe my name, at —, this — day of —, 18—.

[SEAL.]

—, Clerk.

1. When and on what grounds may issue. R. S. 1881, §§ 740, 741; *McIver v. Ballard*, 96 Ind. 76; ante, vol. 2, § 1175.

2. What must contain. *McIver v. Ballard*, 96 Ind. 76.

3. On what property is a lien. *Durbin v. Haines*, 99 Ind. 463.

863.—Execution on transcript from justice of the peace.

State of Indiana, — County.

The State of Indiana to the Sheriff of — County :

Whereas, on the — day of —, 18—, — recovered judgment against — for the sum of — dollars and — cents and costs of suit [said judgment to bear interest from date of rendition thereof, at the rate of — per cent per annum], before —, a justice of the peace of — county [and — became replevin bail therefor on the — day of —, 18—], a transcript of which judgment, duly certified by said justice, was, by said plaintiff on the — day of —, 18—, filed in the clerk's office of the — Circuit Court, which was duly recorded in the order book of said court, and entered on the judgment docket thereof; and said plaintiff having also filed in the clerk's office of said court the certificate of said justice of the peace that an execution had issued on said judgment by said justice to the proper constable, and that the same had been by him returned indorsed that no goods or chattels could be found sufficient to satisfy said judgment or any part thereof; and said plaintiff having filed in the clerk's office of said court an affidavit that said judgment is unpaid, and that there is due said plaintiff thereon the sum of — dollars and — cents, principal and interest thereon from date of rendition at — per cent per annum, and — dollars and — cents, costs accrued to this time.

You are therefore hereby commanded to levy the said sums of money of the property of said — [and said replevin bail] in your county subject to execution, and have the money at the clerk's office, to satisfy said judgment, interest and costs, and return this writ within one hundred and eighty days from the date of the same, with your doings thereon.

Witness my hand and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

864.—Certificate of justice for execution on transcript.

—, Plaintiff,	}	Certificate.
v.		
—, Defendant.		

Before —, justice of the peace in and for — township, — county, Indiana.

Judgment for — dollars.

Dated —, 18—.

I, —, a justice of the peace in and for — township, — county, Indiana, hereby certify that on the — day of —, 18—, I issued an execution on the aforesaid judgment, in due form of law, and delivered the same to —, a constable of said township, which execution was afterward returned by said constable, indorsed “no property of the defendant found in — county whereon to levy.”

Given under my hand and seal this — day of —, 18—.

—, Justice of the Peace. [SEAL.]

865.—Affidavit of plaintiff, his attorney or agent, to procure execution on transcript of justice.

State of Indiana, — County.

I, —, swear that I am the [attorney (agent) of the] plaintiff in the above entitled cause; that the judgment in said cause has not been paid; that there is due thereon the sum of — dollars principal, — dollars interest, and — dollars costs, as I verily believe.

[Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

1. What necessary to authorize execution on justice's transcript. R. S. 1881, § 614; ante, vol. 2, § 1143; *Dehority v. Wright*, 101 Ind. 383.

866.—Execution against property of deceased debtor in possession of heirs or devisees.

The State of Indiana to the Sheriff of — County:

Whereas, on the — day of —, 18—, — recovered judgment in the — Circuit Court against —, directing the sale of the property of the defendant, described as follows: [*describe*], which property is now in the possession of — and —, heirs [*or, devisees*] of said —, deceased, for the payment of his debt of — dollars and — cents, upon which judgment there is now due the sum of — dollars and — cents principal and interest, and — dollars and — cents costs accrued to this time.

You are therefore commanded to levy the said sums of money of said property of the defendant in your county, and have the money in the clerk's office to satisfy said judgment, interest, and costs, and return this execution within 180 days, with your doings thereon.

Witness the seal of the court, and the signature of the clerk, at —, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

867.—Order of sale.

The State of Indiana, County of —.

The State of Indiana to the Sheriff of — County :

Whereas, on the — day of —, 18—, it being the — juridical day of the — term, 18—, of the — Circuit Court, said court rendered the following judgment in this cause: [*set out judgment in full.*]

You are therefore commanded, after giving the legal notice required by law, to sell the above-described premises in accordance with this decree and the law [without relief from valuation or appraisement laws), and have the money arising from said sale at the clerk's office in one hundred and eighty days from this date, to satisfy said judgment, interest and costs, and return this writ, with your proceedings indorsed thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at —, this — day of —, 18—.

—, Clerk.

See ante, vol. 2, § 1180.

868.—For delivery of personal property and damages for detention.

State of Indiana to the Sheriff of — County.

Whereas, — recovered judgment against — in the — Circuit Court on the — day of —, 18—, for the recovery of [*describe the property*], with — dollars damages for the detention thereof and costs of suit, upon which there is due of said damages — dollars and — cents, principal and interest, and — dollars and — cents, costs accrued to this time.

You are therefore commanded to take said property and deliver the same to said —, and to levy the said sums of money of the property of the defendant in your county subject to execution, and have the money in the clerk's office to satisfy said judgment, interest and costs, and return this execution within one hundred and eighty days, with your doings thereon.

Witness the clerk and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

869.—For delivery of personal property, or its value, in the alternative.

The State of Indiana to the Sheriff of — County :

Whereas, on the — day of —, 18—, — recovered, in the — Circuit Court, a judgment against — for the possession (return) of certain property, to wit: [*describe it*], of the value fixed in said judgment of — dollars, together with costs taxed at — dollars, upon which there is due — dollars.

You are therefore commanded to take said property, and deliver the same to said —, and levy said sum of — dollars, costs, of the property of said — subject to execution.

You are further commanded, in case a delivery of said property as aforesaid can not be had, to levy said sum of — dollars, the value thereof, of the property of said — subject to execution; and of this writ make due return, with your doings thereon, within one hundred and eighty days.

Witness the clerk of said court and the seal thereof, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

See ante, vol. 2, §§ 1198, 1510.

870.—For the possession of real estate.

The State of Indiana to the Sheriff of — County :

Whereas, on the — day of —, 18—, — recovered judgment in the — Circuit Court against — for the possession of the following real property, to wit: [*describe it*], and damages in the sum of — dollars and — cents, upon which there is due — dollars and — cents, principal and interest, and — dollars and — cents, costs accrued to this time.

You are therefore commanded to enter upon and deliver possession of said property to said —.

You are further commanded to levy said sums of money of the property of the defendant in your county subject to execution, and have the money in the clerk's office to satisfy said judgment, interest and costs, and return this execution within one hundred and eighty days, with your doings thereon.

Witness the clerk and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

2. BONDS.

871.—Indemnifying bond.

[Title.]

Judgment in the — Circuit Court.

Whereas, an execution has been issued in the above-entitled cause, and is now in the hands of —, sheriff of — county, and whereas, said sheriff has been directed to levy and sell certain — property, and whereas, said property is claimed by — as his own.

Now we, the undersigned, agree to indemnify the said sheriff for all costs and damages that may be assessed against him in making such levy and sale, and in defending against the claim of said —.

Witness our hands and seals, this — day of —, 18—.

— [SEAL.]

— [SEAL.]

1. When sheriff entitled to indemnifying bond. Ante, vol. 2, § 1149; *Allwein v. Sprinkle*, 87 Ind. 240.

872.—Delivery bond.

[Title.]

We undertake, with —, execution plaintiff, that the following property, to wit: [*describe it*], levied upon as the property of —, by virtue of an execution issued in the above-entitled cause by —, sheriff of — county, Indiana, shall be delivered up to said sheriff, at the residence of —, in — township, in — county, on the — day of —, 18—, or at any time previous to said date, upon demand being made at any time between the hours of 10 o'clock A. M. and 4 o'clock P. M., when said officer may be ready to receive the same, in as good condition as the same is at this date, to be sold by said sheriff by virtue of said execution.

Provided, that said — may sell said property at private sale, and when so sold said — shall pay the cash [appraised] value thereof to said sheriff, to be applied in satisfaction of said execution.

In witness whereof, we hereto attach our hands and seals, this — day of —, 18—.

— [SEAL.]

— [SEAL.]

Approved by me, this — day of —, 18—.

—, Sheriff — County.

1. When may be taken and what must contain. R. S. 1881, § 744; ante, vol. 2, § 1154; vol. 3, pp. 108, 109, 111, 686.

3. APPRAISEMENT AND SHERIFF'S RETURN.**873.—Receipt of execution.**

Came to hand —, —, 18—, at — o'clock — M.
 —, Sheriff of — County.

874.—Levy on personal and real property.

By virtue of this execution, I have this — day of —, 18—, levied on the following described property as the property of —, to wit: [*describe it*].

I have also entered and levied upon the following real estate as the property of —, to wit: [*describe it*].
 —, Sheriff — County.

1. What will constitute a levy. Ante, vol. 2, § 1149; Standard Oil Co. v. Bretz, 98 Ind. 231.

875.—Oath of appraisers.

We, the undersigned, selected to appraise the property mentioned in the schedule to which this is annexed, upon oath, say that the several items of property set out therein are worth the respective sums specified, and that the same is the fair cash value at this time. [*If there are liens and incumbrances, add: exclusive of liens and incumbrances.*]

—, } Appraisers.
 —, }

Subscribed and sworn to before me, this — day of —, 18—.
 —, Sheriff — County.

876.—Schedule and valuation.

[*Title.*]

The following is a list of property levied upon by virtue of an execution in this case by me and the valuation thereof as fixed by — and —, appraisers (including the value of the rents and profits of the real estate], to wit:

Description.	Valuation.
—	—

—, Sheriff — County.

1. When property must be appraised, and how. Ante, vol. 2, §§ 1157, 1158.

877.—Return showing sale under order of sale.

And on the — day of —, 18—, in pursuance of the command of this —, I advertised the real estate herein described for sale at the court-house door of — county, Indiana, on the — day of —, 18—, by publication in the —, a weekly newspaper of general circulation, printed and published in the — of —, in said county, and nearest to where said real estate is situated, for more than three weeks, successively, immediately before the day of sale, and by posting up a printed notice thereof at the court-house door of said county, and by posting up like printed notices thereof at three public places of the township where the said real estate is situated, which was done more than twenty days immediately preceding the day of sale, a copy of said notice being hereunto attached, and made a part of this return.

And on the day set for the sale of said real estate, to wit, —, 18—, between the hours of 10 o'clock A. M. and 4 o'clock P. M., at the court-house door of said county, I first offered to the highest and best bidder, for cash in hand, the rents and profits of said real estate for a period not exceeding seven years, by the year, and receiving no bid therefor, I did then and there offer to the highest and best bidder, for cash in hand, the fee-simple right of the defendant of, in and to said real estate as described in said —, and — bid therefor — dollars, and that being the highest and best bid then and there offered, the same was openly struck off and sold to him for that sum, there being present, at and during all the time of said sale, more than three competent bidders; and the purchaser having paid over to me the amount so bid by him, I executed to him my certificate of purchase, bearing even date herewith. Paid over to the plaintiff, as per his receipt hereon, — dollars. Paid over to clerk — dollars, original costs, and retained — dollars, my fees.

Done this — day of —, 18—.

[Attach copy of notice.]

—, Sheriff.

by —, Deputy.

878.—Return authorizing venditioni exponas.

Came to hand —, —, 18—, at — o'clock — M.

By virtue of the within execution, I have this — day of —, 18—, levied upon the following described property as the property of —, execution defendant.

And now, on this, the — day of —, 18—, the time for the return of this execution having expired [and the said property having

been offered for sale and no person bidding thereon], I hereby return this execution unsatisfied, for further proceedings, this — day of —, 18—. —, Sheriff — County.

1. When venditioni exponas may issue. Ante, vol. 2, § 1175; vol. 3, p. 575.

879.—Return of no property found.

I can find no property of the within-named defendant subject to execution upon which to levy the within execution.

—, Sheriff — County.

880.—Of stay by entry of replevin bail.

Now, on this — day of —, 18—, the within execution is stayed by — becoming replevin bail thereon. This execution is therefore returned, with said undertaking of replevin bail attached.

—, Sheriff — County.

881.—Where property has been taken from sheriff upon a writ.

The property described in the levy indorsed hereon was, on the — day of —, 18—, by virtue of a writ of — [*state what, e. g.*] attachment issued out of the office of the — Circuit Court, in an action therein pending between —, as plaintiff, and —, as defendant, taken from me by —, coroner of — county, as appears by his receipt therefor indorsed hereon, and this execution having expired by lapse of time, I return the same unsatisfied this — day of —, 18—. —, Sheriff — County.

882.—Showing demand for personal property and levy on real estate.

This writ came to hand —, —, 18—, at — o'clock — M., and I have made demand on this writ of —, the within named defendant, for personal property to satisfy the same in whole or it part, and finding none, and said defendant not designating any property on which to levy, I levied the same on the following real estate as the property of the defendant: [*describe it*].

—, Sheriff — County.

883.—Showing claim of property, and that same was set off, as exempt.

This writ came to hand —, —, 18—, at — o'clock — M.

I levied the same on the following property as the property of the defendant: [*describe it*].

And on the — day of —, 18—, said defendant filed with me his schedule and affidavit, and demand that said property be set off to him as exempt.

I caused said property to be appraised as provided by law, and the appraised value thereof being less than six hundred dollars, I set the same off to the defendant as exempt from execution.

The schedule and affidavit of said defendant and the appraisement of said property are attached hereto and made a part of this return. I have found no other property of the defendant subject to execution on which to levy this execution, and return the same unsatisfied this — day of —, 18—. —, Sheriff — County.

[*Attach schedule, affidavit, and appraisement.*]

See EXEMPTION, ante, vol. 2, §§ 1159–1165; vol. 3, pp. 293, 344, 590.

884.—Order to sheriff to return execution—Replevin bail.

[*Title.*]

To —, Sheriff of — County, Indiana:

Whereas, the judgment in the above entitled cause has been replevied, you are hereby commanded to return the execution issued thereon forthwith; and if any levy has been made thereunder, you will forthwith discharge the same.

Witness the clerk and seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

885.—Order to return—Supersedeas.

[*Title.*]

To —, Sheriff — County, Indiana:

Whereas, it has been certified to me, by the Supreme Court of the State of Indiana, that in the above entitled cause a *supersedeas* bond has been filed and a *supersedeas* has been granted by said court [*or*, that said court has granted a *supersedeas* upon the defendant giving bond to the approval of the clerk of this court, and he having given said bond].

You are therefore commanded to return the execution herein forth-

with; and if you have levied on any property thereunder, that you forthwith discharge the same.

Witness the clerk and seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

886.—Return by order of clerk.

Came to hand —, —, 18—, at — o'clock — M.

I return this execution, as per the order of the clerk of the Circuit Court hereto attached, and made part of this return.

—, Sheriff — County.

[*Attach order to return.*]

887.—Sheriff's certificate of sale.

I, —, Sheriff of — County, in the State of Indiana, certify that I have this day sold, by virtue of —, to me directed from the clerk of — Court of — county, Indiana, issued on the — day —, 18—, in a case wherein —, plaintiff[s], and —, defendant[s], wherein judgment was rendered on the — day of —, 18—, for the sum of — dollars and — cents, principal and interest to date of judgment, and the further sum of — dollars and — cents, costs accrued to that date, upon which there has accrued — dollars and — cents, interest, and — dollars and — cents, costs, making in all — dollars and — cents, principal and interest, and — dollars and — cents, costs to date of sale; making total amount due, — dollars and — cents.

And the said —, as sheriff aforesaid, levied said — upon the following described real estate, as property of —, on the — day of —, 18—, to wit: [*describe it*], and advertise the same for sale according to law.

And said sale was set for the — day of —, 18—, and the said —, sheriff as aforesaid, did, upon said day, between the hours prescribed by law, at the door of the court-house of — county, offer for sale, at public auction, the rents and profits of said real estate for a term not exceeding seven years, and having received no bid therefor, he did then and there offer for sale, at public auction, the fee-simple of said real estate, and — having bid the sum of — dollars and — cents, and no person bidding more, the same was in due form openly struck off to him, he being the highest and best bidder therefor, and that being the highest and best price bid for the same, and the said — paid the amount so bid by him.

The aforesaid certificate will entitle the said —, the purchaser of

the said real estate as aforesaid, to a deed in fee-simple to said premises in one year from the day of sale, if the same is not redeemed by the defendant, or any other person entitled thereto, paying the purchase money, with interest at eight per centum per annum, before the expiration of one year from the day of sale aforesaid.

—, 18—.

—, Sheriff — County.

4. PROCEEDINGS SUPPLEMENTARY.

888.—Application for an order on defendant to answer concerning his property.

State of Indiana, — County.

In the — Circuit Court, — Term, 18—.

— }
v. } Proceedings Supplementary to Execution.
— }

The above named plaintiff shows to the court that on the — day of —, 18—, he recovered a judgment in this (the — Circuit) court against the above named defendant for — dollars and — dollars costs.

That on the — day of —, 18—, he caused execution to issue thereon to the sheriff of — county [the said defendant being then and still being a resident of said county].

That on the — day of —, 18—, said sheriff returned said execution wholly unsatisfied, indorsed no property of the defendant subject to execution on which to levy this execution.

Wherefore, the plaintiff asks that an order issue to the defendant, requiring him to answer under oath concerning his property within said county.

[Signature.]

Subscribed and sworn to before me, this — day of —, 18—.

—, Clerk — Circuit Court.

889.—Affidavit for order under section 816 R. S. 1881.

[Caption as above.]

—, being duly sworn, on his oath, says that he is the plaintiff in the above entitled cause.

That on the — day of —, 18—, he recovered a judgment in this court against said defendant for — dollars and — dollars costs.

That an execution has been issued to the sheriff of said county

against the property of the defendant, a resident of said county, and which now remains in the hands of said sheriff unsatisfied, the principal, interest and costs now due thereon being — dollars.

That the defendant has personal property in said county subject to execution, to wit: [*describe it*], which he unjustly refuses to apply to the payment of said judgment, or any part of it.

Wherefore, he moves the court for an order requiring said defendant to appear before this court forthwith, to answer concerning said property. [Signature.]

Subscribed and sworn to before me, this — day of —, 18—. —, Clerk — Circuit Court.

890.—Affidavit against third person under section 819 R. S. 1881.

[Caption as above.]

—, being duly sworn, says he is the plaintiff in the above entitled cause.

That he recovered a judgment in this court in the above entitled cause, on the — day of —, 18—, for — dollars and — dollars costs, against the above named defendant, who was then and still is a resident of the county of —, State of Indiana, on which there is now due and unpaid, of principal, interest and costs, the sum of — dollars.

That on the — day of —, 18—, he caused an execution to issue in said cause to the sheriff of said county, which remains in his hands unsatisfied [*or, which was, on the — day of —, 18—, returned by said sheriff unsatisfied*].

That one —, a resident of said county, has property in his possession belonging to said defendant, to wit: [*describe it*], [*or, is indebted to said defendant in the sum of — dollars*].

That said defendant is entitled to property as exempt to the amount of — dollars, and has made his claim therefor, and the property held by said —, together with the amount already claimed by said defendant as exempt, exceeds the amount allowed by law as exempt from execution under said judgment.

Wherefore, he moves the court for an order requiring said — to appear and answer concerning said property [*indebtedness*], and that he be required to deliver said property [*pay said indebtedness*] to the sheriff [*clerk of this court*], to be applied on said judgment.

[Jurat.]

[Signature.]

1. What application or affidavit must contain. R. S. 1881, §§ 815,

816, 819; ante, vol. 2, §§ 1199, 1200, 1202; Dillman v. Dillman, 90 Ind. 585; Earl v. Skiles, 93 Ind. 178; Burkett v. Holman, 104 Ind. 6.

2. Who must be made parties. Ante, vol. 2, § 1201; Earl v. Skiles, 93 Ind. 178.

3. Is a "civil action." Burkett v. Holman, 104 Ind. 6; Burkett v. Bowen, 104 Ind. 184.

891.—Order under sections 815, 816.

[*Title.*]

—, having filed in this court [the office of the clerk of this court] his affidavit, showing [*set out the material parts of the affidavit*]. It is ordered that — be and appear before this court on the — day of this (the next) term thereof, to be holden at —, on the — day of —, 18— [*or, before the judge of this court, at his chambers, on the — day of —, 18—*], to answer concerning his property subject to an execution in the hands of [*late in the hands of*] the sheriff of — county, issued on a judgment rendered by the — court, in an action in said court wherein — was plaintiff and — defendant, and abide the further order of the court.

1. What orders may be made. Ante, vol. 2, § 1204.

892.—Certified order to be served on defendant.

State of Indiana.

The State of Indiana to the Sheriff of — County:

Whereas, the [clerk], [judge of] the — Circuit Court has made the following order: [*copy the order*], you are hereby commanded to summon —, therein named, to be and appear in the — Circuit Court [before the judge of the — Circuit Court], at —, on the — day of —, 18—, to answer concerning the property [*indebtedness*] mentioned in said order, and abide the further order of the court, and that you make due return of your doings in the premises.

Witness the clerk and seal of said court, this — day of —, 18—.

—, Clerk — Circuit Court.

893.—Application for order on transcript of justice of the peace.

—, being duly sworn, says he is the plaintiff in the above entitled cause.

That on the — day of —, 18—, he recovered a judgment before —, a justice of the peace in and for — township, — county,

Indiana, against the above named defendant —, for — dollars and — dollars costs.

That there is now due thereon, and unpaid, of principal, interest and costs, the sum of — dollars.

That he caused execution to issue on said judgment to the constable of said township, who, on the — day of —, 18—, returned the same, indorsed "no goods or chattels can be found sufficient to satisfy the within execution, or any part of it."

That on the — day of —, 18—, he procured from said justice, and filed in the office of the clerk of the — Circuit Court, a transcript of said judgment and the proceedings in said cause, together with a certificate of said justice that execution had been issued on said judgment to —, constable of said township, who had returned the same with his indorsement thereon that no goods or chattels could be found sufficient to satisfy said judgment [execution], or any part of it, which transcript and certificate were, on the — day of —, 18—, duly filed and recorded in the order book of said court in said clerk's office.

That on the — day of —, 18—, this plaintiff filed with said clerk his affidavit that said judgment was unpaid [in part], and that there was due thereon the sum of — dollars, and caused execution to issue from said clerk's office on said transcript to the sheriff of said county, who returned the same on the — day of —, 18—, wholly unsatisfied.

That the above named defendant, —, is a resident of said county of —, and is indebted to said defendant, —, in the sum of — dollars.

That — was, at the time said judgment was rendered, and still is, a resident of said county, and is entitled to an exemption of — dollars under said judgment, which he claims.

That said sum due from said —, together with the property in the hands of said — claimed by him as exempt from execution, exceeds the amount so exempt by law from execution.

Wherefore, he asks that an order be made requiring said — to appear and answer concerning said indebtedness, and that he be required to pay said indebtedness to the sheriff [clerk of this court], to be applied on said judgment.

[Signature.]

[Jurat.]

1. Necessary allegations. R. S. 1881, §§ 815, 816, 819; ante, vol. 2, §§ 1199, 1200; *Burkett v. Holman*, 104 Ind. 6.

894.—Final order on hearing.

[Title.]

Come the parties, and the court having heard the evidence, and being advised in the premises, finds that the allegations of the plaintiff's affidavit herein are true.

It is therefore ordered by the court that the following property of defendant, —, in his hands [in the hands of the defendant, —], subject to execution: [*describe it*], [or, the sum of — dollars due from the defendant, —, to the defendant, —], be applied to the satisfaction of plaintiff's judgment, and that the defendants be and they are hereby forbidden to transfer or in any way dispose of said property, and that said property be delivered [said indebtedness be paid] to the sheriff of said county [clerk of this court] forthwith.

19. EXEMPTIONS.

895.—Inventory, affidavit, and appraisement.

— }
v. } Execution from — Circuit Court.
— }

(a.) Inventory.

An inventory of all the real estate within and without the State of Indiana, and of all moneys on hand and on deposit within and without said state, and all rights, credits and choses in action, and of all personal property of every description and character whatsoever, which belonged to —, or in which he had any interest on the — day of —, 18—, the same being the date of the issuing of the execution in the above entitled cause.

No.	DESCRIPTION OF PROPERTY.	VALUATION.
—	—	—
—	—	—

(b.) Affidavit of defendant.

State of Indiana, — County.

—, being duly sworn, says he is the execution defendant in the above entitled cause.

That he is a resident and householder of the State of Indiana.

That the above and foregoing inventory contains a full, true, complete and correct account of all real estate owned by him, or in which he had any interest, within or without the State of Indiana, and all money on hand or on deposit within or without said state; rights, credits, and choses in action, and all personal property of every character and description whatever belonging to him, or in which he had any interest, on the — day of —, 18—, the same being the date of the execution in said cause.

That none of said property has been disposed of by him since said date [*or, if any has been disposed of, state what, for how much, and what disposition has been made of the proceeds*].

That he claims the above described property as exempt from said execution. [Signature.]

[*Jurat.*]

(c.) **Oath of appraisers.**

State of Indiana, — County.

We, — and —, selected to appraise the property described in the foregoing inventory, swear that in our opinion the above is a just valuation of the property therein described. [Signatures.]

[*Jurat.*]

1. Inventory and appraisement. To avoid two inventories, or schedules, the one made by the defendant should contain a description of each separate item of property, numbered, with columns for the valuations left vacant, to be filled in by the appraisers. This will render one inventory sufficient. To this should be attached the affidavit of the defendant, followed by that of the appraisers.

2. What sufficient affidavit. Ante, vol. 2, § 1162; *Astley v. Capron*, 89 Ind. 167.

3. In what cases allowed. Ante, vol. 2, § 1160; *Church v. Hay*, 93 Ind. 323; *The State v. McIntosh*, 100 Ind. 439; *Dorrell v. Hannah*, 80 Ind. 497; *Smith v. Wood*, 83 Ind. 522; *Nowling v. McIntosh*, 89 Ind. 593; *Maloney v. Newton*, 85 Ind. 565; *Gentry v. Purcell*, 84 Ind. 83.

4. What property partner may claim. *The State v. Emmons*, 99 Ind. 452.

5. Right to exemption, how waived. Ante, vol. 2, § 1161; *Maloney v. Newton*, 85 Ind. 565.

See COMPLAINT, pp. 293, 294; ANSWER, p. 344; ATTACHMENT, p. 344, 525.

20. HABEAS CORPUS.

See COMPLAINT, pp. 161, 162; ANSWER, pp. 370, 371; JUDGMENTS, pp. 455, 456.

896.—The writ.

State of Indiana, — County.

The State of Indiana to —:

You are hereby commanded to have the body of — before the judge of the — Circuit Court, at the court-house, in the city of —, forthwith, to do and receive what shall be ordered concerning him; and have you then and there this writ.

Witness the clerk and seal of said court, this — day of —, 18—. —, Clerk — Circuit Court.

897.—Order on filing petition in vacation.

Comes the plaintiff, by counsel, before me, judge of the — Circuit Court, at chambers, and files his petition, setting forth: [*state the material parts of the petition*], and praying that he be brought before me to inquire as to the legality of his said restraint [imprisonment], and that he be discharged [*or, admitted to bail*].

And said petition having been examined and considered, it is ordered that a writ of habeas corpus be issued by the clerk of this court, according to the prayer of said petition, returnable forthwith before me at chambers. —, Judge — Judicial Circuit.

898.—Order on filing of return and exception thereto.

Come the parties, and the defendant files his return to the writ herein, as follows: [*here insert*], and the plaintiff files his exception thereto, as follows: [*here insert*], which exceptions are submitted to the court, and overruled, to which the plaintiff excepts.

899.—Order where it appears that person in custody is about to be removed out of the jurisdiction of the court.

It appearing to the court, by the affidavit of —, that the above named — is illegally held in custody by —, and that there is a good reason to believe that he will be carried out of the jurisdiction of this court [*or, that said — will suffer irreparable injury before compliance with the writ issued herein can be enforced*], it is ordered

that a warrant issue to the sheriff of — county, commanding him forthwith to bring said plaintiff [*or other person restrained of his liberty*] before this court, to be dealt with according to law, and that he forthwith arrest said defendant and bring him before this court.

For practice generally in habeas corpus proceedings, see ante, vol. 2, §§ 1418–1428; *McGlennon v. Margowski*, 90 Ind. 150.

21. INFANTS.

See COMPLAINTS, p. 166; ANSWER, p. 371.

22. INFORMATIONS.

See QUO WARRANTO and INFORMATION, pp. 268–270, 395.

23. INJUNCTIONS.

See COMPLAINTS, pp. 167–171; JUDGMENTS, p. 456.

900.—Undertaking.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—

— }
v. } Undertaking.
— }

We undertake that the plaintiff in the above entitled cause shall pay to the defendant all damages and costs which may accrue to him by reason of the injunction in this action.

Witness our hands, this — day of —, 18—.

[Signatures.]

Approved by me, this — day of —, 18—.

—, Judge — Circuit Court.

1. What sufficient undertaking. R. S. 1881, § 1153; ante, vol. 2, § 1440.

For form of complaint on undertaking in injunction, see ante, p. 112.

901.—Notice of application for temporary injunction.

[Caption.]

The defendant, —, is hereby notified that on the — day of —, 18—, at — o'clock — M., or as soon thereafter as counsel can be heard, at the court-house at — [or, if application is to be made to the judge, say: at the chambers of the judge of the — Judicial Circuit, in the city of —], the plaintiff will make application to said court [judge] for a temporary injunction, restraining the defendant from [state what, as in the complaint]. —, Attorney for Plaintiff.

1. Notice, when necessary. Ante, vol. 2, § 1438.

902.—Restraining order.

[Caption.]

The plaintiff having filed his complaint herein, praying for a restraining order, and having filed his undertaking to the approval of the judge of this court, it is ordered that the defendant be and he hereby is restrained from [state what, as is prayed for in the complaint], until notice and further order of this court.

It is further ordered that the defendant be notified that an application for a temporary injunction herein will be heard before me, at chambers, in the city of —, on the — day of —, 18—.

—, Judge — Circuit Court.

903.—Order on application for temporary injunction after notice.

[Caption.]

This matter coming on for hearing before me, on the application of the plaintiff for a temporary injunction herein, all parties being present, the plaintiff, in support of his application, submits the affidavits of —, and the defendant, in opposition thereto, submits the affidavits of —.

And the court having seen and examined said affidavits, orders that the defendant be, and he hereby is, restrained from [state what], until the final hearing of this cause, or the further order of the court, to which the defendant excepts.

904.—Motion to dissolve injunction.

[Caption.]

The defendant moves the court to dissolve the injunction heretofore granted against him in this cause, on the following grounds:

1. [State the grounds.] —, Attorney for Defendant.

905.—Notice of motion to dissolve.*[Caption.]*

The plaintiff in the above entitled cause is hereby notified that on the — day of —, 18—, at — o'clock — M., or as soon thereafter as counsel can be heard, the defendant will, at the court-house in the city of —, move the — Circuit Court to dissolve the injunction granted in this cause on the — day of —, 18—.

—, Attorney for Defendant.

906.—Order on motion to dissolve.*[Title.]*

Come the parties, and the defendant moves the court to dissolve the injunction granted herein, and in support thereof submits the affidavits of —, and the plaintiff submits the affidavits of — in opposition to said motion.

And the court having seen and examined said affidavits, overrules said motion, to which the defendant excepts [sustains said motion, and orders that said injunction be, and the same hereby is, dissolved, to which the plaintiff excepts].

907.—Order for attachment for contempt in violating injunction.*[Title.]*

Comes the plaintiff, and by his affidavit shows that the defendant has violated the injunction heretofore issued in this cause, and moves the court for a rule against him, to show cause why he should not be punished for contempt of this court.

It is therefore ordered by the court that the defendant show cause, at — o'clock, —, if any he have, why he should not be attached as for contempt.

908.—Order on showing in an answer to a rule to show cause, etc.*[Title.]*

Come the parties, and the defendant having purged himself of the alleged violation of the injunction issued herein, it is ordered that the rule heretofore issued against him to show cause be, and the same hereby is, discharged.

[Or, and the defendant, desiring to purge himself of the alleged contempt, is examined on oath, and the court finds said defendant guilty of contempt. It is therefore considered and adjudged that the

said defendant be committed to the county jail for — days, to which the defendant excepts.]

For the practice generally in injunction proceedings, see ante, vol. 2, §§ 1435-1445.

24. INTERPLEADER.

909.—Affidavit for interpleader.

State of Indiana, County of —.

In the — Circuit Court

— }
v. } Affidavit for Interpleader.
— }

—, being duly sworn, says he is the defendant in the above entitled cause.

That he admits his indebtedness on the — sued on herein [*or*, that he is in possession of the property described in the complaint], and is ready and willing to pay [deliver] the same to the party entitled to receive it.

That one —, without collusion with this defendant, makes a demand against him for the same debt [property], and the defendant is ignorant of the rights of the parties.

Wherefore, he asks that an order be made substituting said — as the defendant herein in his stead, and that this defendant be discharged, on paying said sum into court [delivering said property to such person as may be designated by the court]. [Signature.]

[*Jurat.*]

1. **What affidavit must contain.** R. S. 1881, § 273; ante, vol 1, § 171. See COMPLAINT, p. 181; ANSWER, p. 332.

2. **In what cases may be had.** Ante, vol. 1, § 172.

910.—Notice to plaintiff of application.

[*Caption.*]

The plaintiff in the above entitled cause is hereby notified that he has filed in said court his affidavit for an interpleader, and that on the — day of —, 18—, at — o'clock — M., or as soon thereafter as the same can be heard, at the court-house in —, the defendant will move said court thereon for an order substituting — as the defendant in said cause, and that the present defendant be allowed to pay into court [deliver to some person to be designated by the court] the amount [property] sued for in said action. [Signature.]

911.—Notice to party sought to be substituted.

To —:

You are hereby notified that in an action now pending in the — Circuit Court, wherein — is plaintiff and — is defendant, the undersigned, the defendant therein, has filed his affidavit in said cause for an interpleader, and praying that you be substituted in his stead as the defendant therein.

You are further notified that on the — day of —, 18—, at — o'clock — M., or as soon thereafter as the same can be heard, the said defendant will, at the court-house in —, move said court that you be substituted as the defendant in said action, in his stead, and that he be allowed to pay into court [deliver to such person as the court may designate] the amount of money [the property] sued for in said action, and that thereupon he be discharged from further liability therefor.

[Signature.]

1. What notices necessary. R. S. 1881, § 273; ante, vol. 1, §§ 171, 173, 174.

2. When money must be paid or property delivered. Ante, vol. 1, § 175.

912.—Order substituting new defendant and discharging the old.

— }
v. } Order of Interpleader.
— }

Come the parties, and — also comes, and the defendant submits to the court his affidavit for an interpleader herein, and moves the court thereon for an order substituting said — as the defendant in this action in his stead, and that he be thereupon discharged from further liability herein.

And it appearing to the court that the defendant has paid into court the sum of — dollars, the amount alleged in plaintiff's complaint to be due, and that said — makes claim thereto, it is therefore ordered by the court that the said — be, and he hereby is, substituted as the defendant herein in the stead of the defendant, —, and that said defendant, —, be, and he hereby is, discharged from further liability herein.

[Or, if the thing sued for is specific property, say: It is ordered that the defendant deliver the property sued for herein, to wit: [describe it], to —, forthwith, and that upon his so delivering said property, and

filing in this court the receipt of said — therefor, that he be discharged from all further liability herein.]

1. **What order should be made.** Ante, vol. 1, §§ 171, 172, 173, 175.

25. INTERROGATORIES.

913.—Interrogatories to be answered by a party to the action.

[*Caption.*]

The plaintiff submits the following interrogatories, and asks that the defendant be ruled to answer the same under oath within a reasonable time:

1. Did you or not execute the note sued on in this action?
2. If you did, what consideration did you receive therefor?

[*Set out any other interrogatories material to the matters in issue.*]

—, Attorney for Plaintiff.

1. What proper and sufficient interrogatories. Ante, vol. 2, § 1233; *French v. Venneman*, 14 Ind. 282; *Mutual, etc., Life Ins. Co. v. Cannon*, 48 Ind. 264.

2. When answers competent as evidence and against whom. Ante, vol. 2, § 1233.

3. When interrogatories must be filed. Ante, vol. 2, § 1233; *Hill v. Nisbet*, 100 Ind. 341; *Wheeler v. Reitz*, 92 Ind. 379; *Cates v. Thayer*, 93 Ind. 156; *Sherman v. Hogland*, 73 Ind. 472.

4. Failure to answer, effect of; how party may be punished. R. S. 1881, § 359; ante, vol. 1, §§ 451, 755; *Fitch v. Citizens' Nat'l Bank of Greensburg*, 97 Ind. 211; *Cates v. Thayer*, 93 Ind. 156.

5. Ruling on, not cause for new trial; must be assigned as error. Ante, vol. 1, § 882; vol. 2, § 1085; *Cates v. Thayer*, 93 Ind. 156.

914.—Rule to answer interrogatories.

[*Title.*]

Come the parties, and the plaintiff files his answers to interrogatories to be answered by the defendant under oath, and the defendant is ruled to answer the same on or before the — day of the present [next] term of this court, to which the defendant excepts. [*Or, and moves the court for a rule upon the defendant to answer the same, which motion the court overrules, and refuses to require said interrogatories to be answered, to which the plaintiff excepts.*]

1. What rule to answer should contain. *Rielay v. Whitecher*, 18 Ind. 458; R. S. 1881, § 359.

2. How interrogatories may be answered. *Wheelock v. Barney*, 27 Ind. 462; *Railsback v. Koons*, 18 Ind. 274; R. S. 1881, § 359.

915.—Affidavit to accompany interrogatories where continuance is asked.

[*Caption.*]

—, being duly sworn, says he is the — in the above entitled cause; that he expects to elicit facts by the answers to the interrogatories filed by him herein, to be answered by the —, material to this — on the trial of the cause; that he believes said facts to be true; that he can not prove the same by any witness, and that he files said interrogatories, not for delay merely, but to obtain substantial justice at the trial.

[*Signature.*]

[*Jurat.*]

1. When affidavit necessary and what must contain. R. S. 1881, § 359; ante, vol. 1, § 755; *Cleveland v. Hughes*, 12 Ind. 512.

26. JUDGMENTS.

For forms of judgments, see ante, pp. 439–474.

916.—Warrant of attorney to confess judgment.

Know all men by these presents, that I do hereby appoint —, an attorney of the — Circuit Court [*or, any other attorney of said court*], my true and lawful attorney, for me and in my name and stead, to enter an appearance in said court at the next or any subsequent term thereof, and there to waive process and confess judgment in favor of — for — dollars, principal and interest, or such sum as may appear to said attorney to be due from me to said —, on [*state the instrument and describe it*], and thereupon to release all errors and waive all right and benefit of appeal in my behalf; hereby ratifying and confirming all and whatsoever my said attorney shall lawfully do in the premises.

Witness my hand, this — day of —, 18—. [*Signature.*]

917.—Affidavit to accompany warrant of attorney.

State of Indiana, — County.

—, being duly sworn, says he is the same — who executed the foregoing warrant of attorney; that the sum of — dollars mentioned therein is justly due and owing to said —, and that said war-

rant is not executed, nor said confession of judgment authorized, nor judgment to be entered, for the purpose of defrauding affiant's creditors. [Signature.]

[Jurat.]

1. What necessary to confession by warrant of attorney. R. S. 1881, § 588; ante, vol. 2, § 1002.

For proceedings without warrant, see ante, vol. 2, § 1001; vol. 3, p. 442.

918.—Motion to have satisfaction of judgment entered.

State of Indiana, County of ——.
 In the — Circuit Court, — Term, 18—.

— }
 v. } Motion to Enter Satisfaction of Judgment.
 — }

The above named — respectfully moves the court to enter satisfaction of a judgment rendered by this court against him and in favor of the above named —, on the — day of —, 18—, for — dollars, and as reasons therefor alleges:

1. [Set out the facts showing that the judgment has been satisfied.]

[Signatures.]

919.—Notice of motion to have satisfaction entered.

To —:

You are hereby notified that I have filed in the office of the clerk of the — Circuit Court my motion to have satisfaction entered of a judgment rendered in said said court against me, in your favor, on the — day of —, 18—, for — dollars, and — dollars, costs, on the grounds: [state them as in the motion], and that said motion will be presented to the court on the — day of —, 18—, that being the — day of the — term of said court.

Dated this — day of —, 18—.

[Signature.]

[Proof of service.]

1. How entry of satisfaction may be had. R. S. 1881, § 581; ante, vol. 1, §§ 1062, 1063.

920.—Application to revive judgment.

[Caption.]

The above named — shows to the court that on the — day of —, 18—, he recovered a judgment in this court against the above named — for — dollars, and — dollars, costs.

[That he caused execution to issue thereon to the sheriff of — county, and the same was, on the — day of —, 18—, returned, wholly unsatisfied (*or, if any thing was made, state the facts*)], and no execution has since issued thereon.

That the following payments have been made thereon, at the times stated [*state the amounts and dates of payments*].

That there is now due and unpaid on said judgment the sum of — dollars and — cents, principal and interest, and — dollars, costs.

Wherefore, he moves the court for an order reviving said judgment, and granting him leave to issue execution thereon. [Signature.]

1. How application made. Ante, vol. 1, § 1064.

921.—Notice of motion to revive judgment.

[Caption.]

To —:

You are hereby notified that I have filed in the office of the clerk of the — Circuit Court a motion to revive the judgment recovered by me against you in said court, on the — day of —, 18—, for — dollars, and — dollars, costs, and that the same will be presented to said court on the — day of —, 18—, at — o'clock — M., or as soon thereafter as the same can be heard, at the courthouse in —. [Signature.]

Dated this — day of —, 18—.

[Proof of service.]

1. What proceedings necessary to revive judgments. Ante, vol. 1, §§ 1064–1067.

922.—Order reviving judgment and granting leave to issue execution.

— }
v. } Order Reviving Judgment.
— }

This cause now coming on for hearing on the motion for the revivor of a judgment rendered by this court in favor of — against —, on the — day of —, 18—, wherein — was plaintiff and — defendant, and the defendant having been duly served with personal notice more than ten days before the time of hearing said motion, and sufficient cause being shown therefor, and it appearing that there is now due on said judgment — dollars, it is therefore ordered by the court that said judgment do stand revived for said sum of — dol-

lars, and that said — be allowed to issue execution thereon for said amount.

It is further considered and ordered that — pay the costs of this proceeding.

923.—Application for relief from judgment rendered on constructive notice.

[*Caption.*]

The above named defendant shows to the court that on the — day of —, 18—, the above named plaintiff recovered a judgment against him in this court, in the above entitled cause, for [*state what the judgment is*].

That the only notice given to the defendant in said cause was by publication in a newspaper, and the defendant received no actual notice thereof in time to appear in court and object to said judgment.

That he files herewith, and makes a part of this motion, his answer to the complainant in said action.

Wherefore, he asks that said judgment be opened, and that he be allowed to defend said action.

[*Signature.*]

[*File answer.*]

924.—Affidavit to accompany application.

[*Caption.*]

—, being duly sworn, says he is the defendant named in the foregoing application, and that he had no actual notice of the pendency of the action therein named in time to appear in court and object to said judgment.

[*Signature.*]

[*Jurat.*]

925.—Order fixing time of hearing and notice to be given.

[*Title.*]

Comes —, and files his application to open the judgment in this cause, rendered against him on the — day of —, 18—, and also files his affidavit showing that he had no actual notice of the pendency of said action in time to appear in court and object to said judgment, and also files his answer to the complaint in said cause, and thereupon moves the court to fix the time for hearing said application and the notice to be given the plaintiff thereof.

It is therefore ordered by the court that said application be and the same hereby is set down for hearing on the — day of the present [next] term of this court, at — o'clock — m., and that the defend-

ant notify the plaintiff thereof by personal service of written notice of the time and place of said hearing — days before the time fixed therefor.

926.—Notice of time of hearing application.

[*Caption.*]

The plaintiff in the above entitled cause is hereby notified that the defendant has filed his application in the — Circuit Court to open the judgment rendered therein in said cause, in favor of the plaintiff and against the defendant, on the — day of —, 18—, for [*state what*], and to be allowed to defend said action, on the ground that the only notice given of the pendency of said action was by publication in a newspaper, and that he had no actual notice of the pendency thereof in time to appear in court and object to said judgment.

You are further notified that the hearing of said application has been fixed by order of the court for the — day of the present [next] term of said court [that being the — day of —, 18—], at — o'clock — M.

[*Signature.*]

[*Proof of service.*]

927.—Order opening judgment and allowing defense to be made.

[*Title.*]

Come the parties [*or, if the plaintiff does not appear, show the giving of notice as ordered by the court*], and the motion of the defendant for an order opening the judgment rendered against him in this cause, on the — day of —, 18—, coming on for hearing, and it appearing to the court that the only notice given of the pendency of said action was by publication in a newspaper, and that the defendant had no actual notice thereof in time to appear in court and object to said judgment, it is therefore considered and ordered that the judgment rendered in this action, on the — day of —, 18—, be, and the same hereby is, opened, and that the defendant be and he hereby is allowed to defend said action.

It is further ordered that the defendant pay the costs occasioned by this application.

For the practice generally in proceedings to open judgments rendered on constructive notice, see *ante*, vol. 1, § 994; vol. 3, p. 555.

928.—Motion to correct judgment.

[Caption,]

The defendant [plaintiff] moves the court to correct and modify the judgment rendered in this cause, in this court, on the — day —, 18—, by [state the correction asked for]. [Signatures.]

1. How and when objection to judgment must be made. Ante, vol. 1, §§ 1030, 1031; Daniels v. McGinnis, 97 Ind. 549; American Ins. Co. v. Gibson, 104 Ind. 336.

2. Amendments of judgments generally. Ante, vol. 1, §§ 714-719; Ryon v. Thomas, 104 Ind. 59; Urbanske v. Mann, 87 Ind. 585; Gray v. Robinson, 90 Ind. 527; Runnels v. Kaylor, 95 Ind. 503.

27. LIS PENDENS.

929.—Notice of pendency of action.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Lis Pendens Notice.
— }

Notice is hereby given that, the above named plaintiff has filed his complaint against the above named defendant to recover the possession [or state other object of the action] of the following real estate in the county of —, State of Indiana: [describe it.] —, by —, Attorney.

Filed and recorded the — day of —, 18—.

—, Clerk — Circuit Court.

1. In what cases may be filed and where. R. S. 1881, §§ 324, 325.

930.—Notice of levy under execution or attachment.

[Caption.]

Notice is hereby given that the undersigned, sheriff [coroner] of — county, State of Indiana, has, by virtue of a writ of attachment issued in the above entitled cause [an execution issued on a judgment rendered in the above entitled cause] by the clerk of the — Court of — county, State of Indiana, attached [levied upon] the following described real estate situate in the county of —, State of Indiana: [describe it], as the property of said —.

—, Sheriff [Coroner] — County.

Filed and recorded this — day of —, 18—, at — o'clock — M.

—, Clerk — Circuit Court.

1. Notice, when necessary, and where recorded. R. S. 1881, § 326.

2. Effect of failure to give notice. R. S. 1881, § 331.

28. MANDATE AND PROHIBITION.

931.—Alternative writ.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

The State of Indiana, on the Relation	}	Alternative Writ of Mandate.
of —,		
v.		
—, Auditor of the County of —.		

The State of Indiana to —, Auditor of the County of —:

Whereas, —, as relator in the above entitled cause, has filed in this court his sworn complaint, alleging: [*state the material part of the complaint*], and praying that an alternative writ of mandate be issued commanding you to [*state what, as in the complaint*], or show cause why the same should not be done.

Now, therefore, you are hereby commanded to [*state the acts to be done*], or in default thereof that you appear before said court, at the court-house in —, on the — day of —, 18—, at — o'clock — M., to show cause, if any you have, why the same should not be done, and have you then and there this writ.

Witness the clerk and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

1. Writ may be amended. *Morris v. The State*, 94 Ind. 565.

932.—Peremptory writ.

[*Caption as above.*]

The State of Indiana to —, Auditor of — County:

Whereas, upon the determination of the issues of law and fact in the above entitled cause it was ordered and adjudged by said court that you [*state what, as in the judgment*].

Now, therefore, you are commanded to [*state what*], forthwith. And this you will not omit under the pains and penalties of a contempt of said court.

Witness my hand and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk of the — Circuit Court.

933.—Order for alternative writ.

[Caption.]

Comes said relator and files his verified complaint, wherein he prays that a writ of mandate issue out of this court, commanding the defendant to [*state what, as prayed for in the complaint*].

And the court having examined said complaint, and being advised in the premises, it is ordered that a writ issue commanding the defendant to [*state what*], or show cause, on the — day of —, 18—, at — o'clock — M., why he does not do so.

1. Practice in mandamus proceedings generally. Ante, vol. 2, §§ 1446, 1450; vol. 3, pp. 218-220, 383, 458.

934.—Order for issuance of a temporary writ of prohibition.

State of Indiana, on the Relation of —,	} Order for Writ of Pro-
v. —.	

Comes the above named relator and files his verified complaint herein, praying that a writ of prohibition issue out of this court, prohibiting the defendant from [*state what, as in the complaint*].

And the court having seen and examined said complaint, and being advised in the premises, it is ordered that a writ issue commanding said defendant that he refrain from [*state what*], until the return of said writ, and the further order of this court, and that he be and appear in this court on the — day of —, 18—, at — o'clock — M., and show cause, if any he have, why he should not be absolutely restrained from any further proceedings in said matter, and that he have then and there said writ.

935.—Temporary writ of prohibition.

[Caption.]

The State of Indiana to —:

Whereas, —, relator in the above entitled cause, has filed in the — Circuit Court his verified complaint, alleging: [*state the material parts of the complaint*], and praying that a writ of prohibition issue out of said court, prohibiting you from [*state what, as prayed in the complaint*].

Now, therefore, you are commanded to refrain from [*state what*], until the return of this writ, and the further order of the court, and that you be and appear before said court, at —, on the — day of —, 18—, at — o'clock — M., and show cause, if any you have, why

you should not be absolutely restrained from any further proceedings in said matter, and that you have then and there this writ.

Witness the clerk and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

936.—Judgment for absolute writ of prohibition.

[Title.]

Come the parties, and the defendant files his return to the writ issued herein, as follows: [*here insert*], and this cause is now submitted to the court for hearing, and the court having heard the evidence, and being sufficiently advised in the premises, finds that an absolute writ of prohibition should issue as prayed for.

It is therefore considered and adjudged by the court that the defendant be, and he [it] hereby is, absolutely restrained from [*state what*], and that a writ issue out of and under the seal of this court in accordance herewith.

It is further considered and adjudged that the plaintiff recover of the defendant, for the use of the relator, the costs and charges by said relator expended in this cause.

937.—Absolute writ of prohibition.

[Caption.]

Whereas, on the determination of the law and facts in the above entitled cause, it was adjudged that you be absolutely restrained from [*state what*].

Now, therefore, you are commanded that in conformity with said judgment you refrain from any further proceedings in said matter. And this you will obey under the pains and penalties of a contempt of said court.

Witness the clerk, and the seal of said court, this — day of —, 18—.

[SEAL.]

—, Clerk — Circuit Court.

1. Practice in prohibition proceedings generally. Ante, vol. 2, §§ 1451, 1452.

29. MECHANICS' LIENS.

938.—Notice of lien to be recorded.

—, —, 18—.

To —, and all others concerned :

You are hereby notified that I intend to hold a mechanics' lien on [*describe the real estate particularly*], and also upon [*describe the building*], recently erected thereon by —, for the sum of — dollars, for work and labor done, and materials furnished by me, in and for the erection and construction of said building, and which material was used in the construction thereof. Said work and labor was done, and materials furnished, by me, at your request [at the request of —, who contracted with you for the construction of said building], and within the last sixty days.

Said sum of — dollars is now due [will fall due on the — day —, 18—].

[Signature.]

1. What notice must contain. Sup'l R. S. 1881, § 6953; ante, vol. 1, § 393; *Simonds v. Buford*, 18 Ind. 176; *Wade v. Reitz*, 18 Ind. 307; *Peck v. Hensley*, 21 Ind. 344; *Caldwell v. Asbury*, 29 Ind. 451; *Newcomer v. Hutchings*, 96 Ind. 119; *McGrew v. McCarty*, 78 Ind. 496.

939.—Notice to owner of labor or materials furnished to contractor.

—, —, 18—.

To —:

You are hereby notified that I have contracted with —, who has contracted with you for the construction of your [*name the building*], on [*describe the real estate*], to furnish, and am furnishing [about to and will furnish] him with [*state what, e. g.*] the lumber [brick] for the construction of said building [or, to perform labor on said building as a (*state what, e. g.*) carpenter], and that I intend to look to your said property for the payment therefor.

[Signatures.]

1. Notice, what and when necessary, and when must be given. Sup'l R. S. 1881, §§ 6955, 6959.

940.—Notice to owner by sub-contractor; personal liability.

—, —, 18—.

To —:

You are hereby notified that I, as a sub-contractor, contracted with —, the contractor with you for the construction of your [*describe*

the building], on [*describe the real estate*], to furnish [*state what, e. g.*] the lumber for the construction of said building; that I furnished said lumber to him, and the same was used in the construction of said building, and there is due me therefor, from said —, the sum of — dollars, for which I hold you responsible. [*Or, if the claim is for labor, state what labor was performed, and the amount due from the contractor.*]
[Signature.]

1. What notice must contain and on whom served. Sup'l R. S. 1881, § 6959.

941.—Notice by owner to holder of lien to sue.

—, —, 18—.

To —:

You are hereby notified to bring suit to enforce the mechanics' lien claimed by you against my real estate, as described in your notice of intention to hold said lien filed in the recorder's office of — county, Indiana, on the — day of —, 18—. [Signature.]

1. Effect of notice to sue. Sup'l R. S. 1881, § 6960.

942.—Undertaking by owner to release property from lien.

State of Indiana, County of —.

In the — Circuit Court, — Term, 18—.

— }
v. } Undertaking to Release Property.
— }

We undertake that the defendant in the above entitled cause will pay any judgment that may be recovered against him, and the costs therein. [Signatures.]

Approved by the court, this — day of —, 18—.

—, Judge.

1. When may be given and its effect. Sup'l R. S. 1881, § 6961.

For the practice and other forms relating to mechanics' liens, see ante, vol. 1, §§ 298–302, 393; vol. 3, pp. 203–206, 384.

30. MOTIONS.

See APPELAS, p. 496; APPEARANCE, p. 321; DEFAULT, p. 549; DEMURRER TO EVIDENCE, p. 330; FINDINGS, p. 429; JUDGMENTS, VOL. 3—39

p. 599; NEW TRIAL, pp. 432, 434; ORDERS, p. 610; VENIRE DE NOVO, p. 438.

31. NEW TRIAL.

See vol. 1, §§ 866-969; vol. 3, pp. 432-437; ORDERS, p. 622.

32. NOTICES.

See APPEAL, pp. 484, 485, 493; ARBITRATION AND AWARD, p. 510; ATTORNEYS AT LAW, p. 532; CERTIORARI, p. 497; CHANGE OF NAME, p. 539; CHANGE OF VENUE, p. 540; DEPOSITIONS, pp. 418, 421; DRAINAGE, pp. 558, 567, 568; EVIDENCE, pp. 425-426; INTERJUNCTION, pp. 594, 595; INTERPLEADER, pp. 596, 598; JUDGMENTS, pp. 600, 603; LIS PENDENS, p. 604; NEW TRIAL, p. 435; PRINCIPAL AND SURETY, p. 629; PUBLICATION, p. 325.

33. ORDERS, RULES, AND RECORD ENTRIES.

See APPEALS, p. 483; ATTACHMENT, p. 526; ARBITRATION AND AWARD, p. 512; ASSESSMENT OF DAMAGES, p. 516; ATTORNEYS, p. 529; CHANGE OF NAME, p. 539; CHANGE OF VENUE, p. 542; CONTINUANCE, p. 548; DEFAULT, p. 550; DIVORCE AND ALIMONY, pp. 553, 554; DRAINAGE, pp. 559, 561; EXECUTIONS, pp. 584, 588, 589; HABEAS CORPUS, p. 592; INJUNCTIONS, pp. 594, 595; INTERPLEADER, p. 597; JUDGMENTS, pp. 439-474, 601, 602, 603; PROCEEDINGS SUPPLEMENTARY, p. 589; RECEIVER, p. 631; REFEREES, p. 635.

1. PRELIMINARY ORDERS AND ENTRIES.

943.—Term placita.

Pleas and proceedings had in the — Circuit Court, within and for — county, State of Indiana [which county forms a part of the — Judicial Circuit of said state], at the — Term, 18—, which term of said court was begun and continued at the court-house in the city of —, in the county and state aforesaid, commencing on Monday, the — day of —, 18—, that being the day fixed by law for holding said term of said court.

Present: Honorable —, sole judge; —, the clerk thereof; and —, the sheriff of said county [by —, his deputy].

Whereupon, said [deputy] sheriff proclaimed said court open according to law, and the following proceedings were had, to wit: [*set out proceedings*].

944.—Daily placita.

—, —, —, 18—.

Court met pursuant to adjournment. Present, the same judge and officers as of yesterday.

Whereupon, the sheriff proclaimed said court open pursuant to adjournment, and the following proceedings were had therein, to wit: [*set out proceedings*].

945.—Filing complaint.

— }
v. } Complaint Filed.
— }

Comes the above named plaintiff, and files his complaint in this cause, as follows: [*here insert.*]

946.—General appearance by defendant.

— }
v. } General Appearance.
— }

Comes the plaintiff, and the defendant also comes, and enters his appearance herein [by —, his attorney], [and files his answer as follows: (*here insert*)], [is ruled to answer the complaint].

947.—Special appearance.

— }
v. } Special Appearance Entered.
— }

Comes the plaintiff, and the defendant enters a special appearance herein, for the purpose of [*state what, e. g.*] moving to quash the summons [set aside the sheriff's return to the summons], [object to the service by publication herein], and for no other purpose.

1. Entry of special appearance and its effect. Anta, vol. 1, § 223.

948.—Leave to attorney to withdraw his appearance.

Comes the plaintiff, and —, who appears for the defendant herein, and, on the request of said —, he is allowed to withdraw his appearance for said defendant.

1. When leave to withdraw appearance will be given. Anta, vol. 1, § 450.
2. Effect of withdrawal of appearance. Anta, vol. 1, § 450.

949.—Order for publication.

— }
 v. } Order for Publication.

Comes the plaintiff and files his affidavit for publication of notice to defendant, as follows: [*here insert*], and on his motion it is ordered that publication be made as prescribed by law.

950.—Proof of publication.

— }
 v. } Proof of Publication.

Comes the plaintiff and makes proof of publication of notice to defendant by the affidavit of —, which notice and affidavit read as follows: [*here insert*.]

See PUBLICATION, p. 324.

951.—Motion to quash summons; leave to amend same.

— }
 v. } Motion to Quash Summons. Leave to Amend.

Comes the plaintiff, and defendant enters a special appearance herein for that purpose only, and moves the court to quash the summons herein, on the ground that [*state what*], which motion is sustained, to which the plaintiff excepts; and on motion of the plaintiff leave is granted him to have said summons amended, by [*state what, e. g.*], causing the seal of the court to be attached thereto [*or, said motion is overruled, to which the defendant excepts*].

1. What sufficient summons. Ante, vol. 1, § 207; vol. 3, p. 321.

2. Amendment of summons. Ante, vol. 1, § 207.

952.—Motion to set aside publication.

— }
 v. } Motion to Set Aside Publication.

Comes the plaintiff, and the defendant, by —, his attorney, enters a special appearance herein for that purpose only, and moves the court to set aside the publication [quash the notice published] herein, on the following grounds: [*state them*], which motion is submitted to the court and sustained, to which the plaintiff excepts [overruled, to

which the defendant excepts]; and on motion of the plaintiff this cause is continued for process until the next term of this court.

See ante, vol. 1, §§ 219, 220, 248; vol. 3, pp. 248, 324-326, 549.

953.—Motion to set aside sheriff's return on summons.

— }
v. } Motion to Set Aside Sheriff's Return on Summons.

Comes the plaintiff, and the defendant, by —, his attorney, enters a special appearance for that purpose only, and moves the court to set aside the return of the sheriff indorsed on the summons herein, on the grounds [*state them*], which motion is submitted to the court and sustained, to which the plaintiff excepts [overruled, to which the defendant excepts].

And on motion of plaintiff the sheriff is allowed to amend said return.

Ante, vol. 1, §§ 248, 723.

954.—Default on personal service.

— }
v. } Default.

Comes the plaintiff, and it appearing to the court, by the summons issued herein and the return of the sheriff indorsed thereon, which summons and return are as follows: [*here insert*], that the defendant has been duly served with process, by personal service, more than ten days before the first day of the present term of this court [the — day of the present term of this court, which was fixed by the plaintiff's indorsement on his complaint herein as the return day of said summons]. Said defendant is three times loudly called, but comes not, and makes default.

955.—Default on constructive notice.

— }
v. } Default.

Comes the plaintiff, and it appearing to the satisfaction of the court, by the notice and proof of publication herein, which notice and proof of publication read as follows: [*here insert*], that the defendant has been notified of the pendency of this action by three successive weekly publications in the —, a newspaper of general circulation,

printed and published in the English language, in the city of —, county of —, State of Indiana, the last of which publications was made more than thirty days before the first day of the present term of this court. And said defendant being three times loudly called, in open court, comes not, but makes default.

See ante, vol. 1, §§ 203–249, 448–468; vol. 3, pp. 320, 326, 549.

956.—Default of plaintiff; dismissal for want of prosecution.

— }
v. } Default and Dismissal for Want of Prosecution.
— }

Comes the defendant, and the plaintiff being three times loudly called, in open court, comes not, but makes default.

And on motion of the defendant this cause is dismissed, at the costs of the plaintiff, for want of prosecution.

[*Judgment for costs.*]

957.—Appointment of guardian ad litem.

— }
v. } Appointment of Guardian *Ad Litem*.
— }

Come the parties, and on motion of the plaintiff —, an attorney of this court, is appointed guardian *ad litem* for the infant defendants, — and —, and, being present in court, accepts said appointment, and is ruled to answer for said defendants.

1. When guardian ad litem may be appointed. Ante, vol. 1, § 98; vol. 2, § 1362.

958.—Order for security for costs.

— }
v. } Order for Security for Costs.
— }

Come the parties, and on motion of the defendant, supported by his affidavit of the non-residency of the plaintiff, it is ordered that the plaintiff file his undertaking for costs, with sufficient surety, on or before the — day of the present term of this court.

1. When cost bond necessary. Ante, vol. 1, § 1028; vol. 3, p. 110.

2. Form of complaint on. Ante, p. 110.

959.—Dismissal for failure to give security for costs.

— }
 v. } Dismissal for Failure to Give Security for Costs.
 — }

Come the parties, and on motion of the defendant this cause is dismissed, at the costs of the plaintiff, for his failure to give security for costs, as heretofore ordered by this court.

[*Judgment for costs.*]

1. When failure to give cause for dismissal. Ante, vol. 1, § 1028.

960.—Order for additional security for costs.

— }
 v. } Order for Additional Security for Costs.
 — }

Come the parties, and it appearing to the court, by the affidavit of —, that the security heretofore given by the plaintiff for costs is insufficient, he is ordered to file his additional undertaking for costs, with sufficient surety, on or before the — day of the present term of this court.

961.—Order for undertaking by next friend.

— }
 v. } Order for Undertaking by Next Friend.
 — }

Come the parties, and on motion of the defendant —, the plaintiff's next friend, is ordered to execute a written undertaking, with sufficient surety, to the infant plaintiff, conditioned that he shall duly account to such infant for all moneys that may be recovered in this action.

1. Court may require the undertaking to be given. R. S. 1881, § 257.

962.—Removal and substitution of next friend.

— }
 v. } Removal and Substitution of Next Friend.
 — }

Come the parties, and on motion of the defendant —, next friend of the plaintiff, is removed, and — is appointed as such next friend.

See ante, vol. 1, §§ 78, 79, 80; vol. 3, p. 166.

963.—Leave to prosecute or defend as a poor person.

v.
}
 Leave to Prosecute or Defend as a Poor Person.

Come the parties, and the plaintiff [defendant] shows, to the satisfaction of the court, by his affidavit filed herein, that he has not sufficient means to prosecute [defend] this action, and moves the court to be allowed to prosecute [defend] the same as a poor person.

It is therefore ordered that said plaintiff [defendant] be and he hereby is allowed to prosecute [defend] this action as a poor person, and the court assigns —, an attorney of this court, as his counsel herein, and all other officers requisite for his prosecution [defense] of this action. And said —, being present, accepts the appointment as such attorney.

1. When party may prosecute or defend as a poor person. R. S. 1881, § 260; ante, vol. 1, §§ 80, 86.

2. RELATING TO THE PLEADINGS.**964.—Filing of agreed case.**

v.
}
 Filing of Agreed Case.

Come the above named parties and file their agreed statement of facts herein, as follows: [*here insert*]; and their affidavit attached thereto, as follows: [*here insert*]; and this cause is now submitted to the court thereon.

See ante, vol. 1, §§ 249, 811–813, 997; vol. 3, pp. 7, 440.

965.—Disclaimer.

v.
}
 Disclaimer Filed.

Come the parties, and the defendant files his disclaimer herein, as follows: [*here insert*.]

See ante, vol. 1, §§ 555–557, 1024; vol. 3, p. 332.

966.—Rule to answer.

— }
 v. } Rule to Answer.
 — }

Come the parties, and the defendant is ruled to answer the complaint [and the interrogatories submitted therewith], [the plaintiff is ruled to answer the counter-claim (cross complaint)], on or before the — day of the present term of this court.

967.—Demurrer to complaint filed.

— }
 v. } Demurrer to Complaint Filed.
 — }

Come the parties, and the defendant files his demurrer to the complaint, as follows: [*here insert.*]

968.—Demurrer to complaint sustained; exception; leave to amend.

Come the parties, and the demurrer to the complaint heretofore filed is submitted to the court and sustained, to which the plaintiff excepts.

And plaintiff is given leave to amend his complaint [by filing an additional paragraph].

969.—Motion to make complaint more specific, and ruling.

— }
 v. } Motion to Make Complaint More Specific Sustained [Overruled].
 — }

Come the parties, and the defendant moves the court to make the complaint [bill of particulars made part of the complaint] more specific by [*state in what respect it is moved to make it more specific*], which motion is submitted to the court and sustained, to which the plaintiff excepts [overruled, to which the defendant excepts].

1. Motions should not be inserted in the entry. No paper that does not become a part of the record without a bill of exceptions should be copied into an entry or called for by a "here insert." It only serves to incumber the record, as the same paper must be again copied into a bill of exceptions or made a part of the record by order of the court. As to what is part of the record without a bill of exceptions and what is not, see *ante*, vol. 2, §§ 1074, 1081; vol. 3, pp. 475-483.

970.—Motion to separate causes of action and ruling.

— }
v. } Motion to Separate Causes of Action Sustained [Overruled].
 — }

Come the parties, and the defendant moves the court to require the plaintiff to separate the several causes of action set out in his complaint into separate paragraphs and number the same, which motion is submitted to the court and sustained, to which the plaintiff excepts [overruled, to which the defendant excepts].

See ante, vol. 1, §§ 313, 314, 376.

971.—Answer filed ; rule to reply.

— }
v. } Answer Filed ; Rule to Reply.
 — }

Come the parties, and the defendant files his answer as follows: [*here insert*], and the plaintiff is ruled to reply.

972.—Demurrer to part and motion to strike out parts of answer and rulings.

— }
v. } Demurrer and Motion to Strike out Parts of Answer.
 — }

Come the parties, and the plaintiff files his demurrer to the — and — paragraphs of the answer, as follows: [*here insert*], and his motion to strike out the — paragraph of said answer. And said demurrer and motion are submitted to the court, and said demurrer is sustained as to the — paragraph of said answer, to which the defendant excepts, and overruled as to the — paragraph, to which the plaintiff excepts; and said motion is sustained [overruled], to which the defendant [plaintiff] excepts, and leave is given the defendant to amend his answer [*or, and the plaintiff is ruled to reply*].

973.—Demurrer to several paragraphs of reply ; ruling.

— }
v. } Demurrer to Reply.
 — }

Come the parties, and the defendant files his demurrer to the —, — and — paragraphs of the reply, as follows: [*here insert*], which demurrer is submitted to the court and sustained as to the — paragraph, to which the plaintiff excepts, and overruled as to the — and — paragraphs, to which the defendant excepts, and leave is given the plaintiff to amend said — and — paragraphs.

974.—Filing counter-claim or cross-complaint.

— }
 v. } Counter-claim Filed.
 — }

Come the parties, and the defendant, —, files his counter-claim [cross-complaint], as follows, and the plaintiff and the defendants, — and —, are ruled to answer the same [*or, if notice is necessary, show service of summons or publication, as in case of the original complaint, if there is no appearance*].

1. When notice necessary on counter-claim or cross-complaint.

Ante, vol. 1, § 208.

975.—Admitting new party on his application.

— }
 v. } — Admitted as a Party Defendant.
 — }

Come the parties, and — also comes and files his petition to be made a party defendant herein, which petition is granted and said — made a party defendant herein, to which the plaintiff [defendant] excepts; and said — is ruled to answer the complaint.

976.—Order of court making new parties without motion.

— }
 v. } — and — Made Parties.
 — }

Come the parties, and it appearing to the court that a complete determination of the controversy in this action can not be had without the presence of — and —, it is ordered by the court that they be and they hereby are made parties defendant herein, and this cause is continued until the next term of this court for service of process on said parties.

1. When court may order new parties to be brought in. Ante, vol. 1, §§ 163, 169.

2. Making new parties generally. Ante, vol. 1, §§ 163–175.

977.—Striking out name of party.

— }
 v. } Name of — Striken Out as a Party.
 — }

Come the parties, and on motion of the defendant the name of — as a plaintiff herein is stricken out [and this cause as to him is dismissed], to which the plaintiffs [said —] except.

3. RELATING TO THE EVIDENCE.

See EVIDENCE, pp. 415, 425-427; DEPOSITIONS, p. 418.

978.—Order on failure of party to testify; pleading stricken out.

— }
v. } Answer of Defendant Stricken Out for Refusal to Testify.

Comes the plaintiff, and shows to the court that, on the — day of —, 18—, after giving proper notice, he caused a subpoena to be served upon the defendant, requiring him to appear before —, a — of the county of —, to give his deposition in this cause on behalf of plaintiff; that said subpoena was duly served on the defendant in time for him to have appeared and given his deposition, and that he willfully and purposely refused to appear and testify.

Therefore, on motion of plaintiff, it is ordered that the answer of the defendant be and it hereby is stricken out, to which the defendant excepts.

4. ON PROCEEDINGS AT THE TRIAL.

979.—Request for special findings and conclusions of law.

— }
v. } Request for Findings.

Come the parties, and the plaintiff files his request that the court find the facts specially, and its conclusions of law thereon, as follows: [*here insert.*]

See FINDINGS, p. 428.

980.—Submission to the court for trial.

— }
v. } Submission.

Come the parties, and this cause being at issue, is now submitted to the court for trial, without the intervention of a jury.

98.—Submission on agreed facts.

— }
v. } Submission on Agreed Facts.

Come the parties, and this cause being at issue, is now submitted to

the court for trial upon the following facts, as agreed upon by the parties: [*here insert.*]

982.—Impaneling jury and submission.

— }
v. } Jury Impaneled and Cause Submitted.

Come the parties, and this cause being at issue, is submitted for trial to a jury, to wit: [*name them*], twelve good and lawful men, householders or freeholders of the county of —, duly impaneled and sworn to try the same, and a part of the evidence being heard, and there not being time to complete the same, this cause is continued until to-morrow morning.

983.—Return of verdict and answers to interrogatories.

— }
v. } Verdict and Answers to Interrogatories Returned.

Come the parties, and the jury also come and return into open court their verdict, as follows: [*copy it*], and also the special interrogatories submitted to them and their answers thereto, as follows: [*copy them*], and said jury is thereupon discharged.

984.—Objection to receiving verdict.

— }
v. } Objection to Receipt of Verdict Sustained.

Come the parties, and the jury also come, and offer to return their verdict; whereupon, the defendant objects to said verdict being received [and in support thereof submits the affidavit of —], which objection is sustained, and said jury are discharged, without having returned their verdict, to which the plaintiff excepts.

985.—Special findings and conclusions of law.

— }
v. } Findings and Conclusions of Law.

Come the parties, and the court renders and files its special findings and conclusions of law thereon, as follows: [*copy them*], and the plaintiff [defendant] excepts to said conclusions of law, and each of them.

986.—Entry of demurrer to evidence and ruling thereon.

}
v. Demurrer to Evidence Sustained [Overruled].

Come the parties, and the jury also come, and the plaintiff [defendant] files his demurrer to the evidence, as follows: [*here insert*], which demurrer is submitted to the court and sustained, to which the plaintiff [defendant] excepts, [is overruled, to which the plaintiff (defendant) excepts], and this cause is submitted to the jury for an assessment of the damages which the plaintiff [defendant] should recover.

5. IN PROCEEDINGS FOR NEW TRIAL, VENIRE DE NOVO, AND ARREST OF JUDGMENT.**987.—Filing motion for new trial; ruling.**

}
v. Motion for New Trial Overruled [Sustained].

Come the parties, and the plaintiff [defendant] files his motion and reasons for a new trial, as follows: [*here insert*], which motion is submitted to the court and overruled [sustained], to which the plaintiff [defendant] excepts.

See NEW TRIAL, vol. 1, §§ 866-975; vol. 3, pp. 251, 432-437.

988.—Motion for new trial as of right.

}
v. New Trial as of Right Granted [Denied].

Comes the plaintiff [defendant] and files his motion for a new trial herein as of right, as follows: [*here insert*], and also his undertaking for costs, as follows: [*here insert*], and said motion being submitted to the court, is sustained [overruled], to which the defendant [plaintiff] excepts.

See NEW TRIAL, vol. 1, §§ 960-969; vol. 3, pp. 434, 435.

989.—Motion for a venire de novo.

}
v. Venire de Novo Sustained [Overruled].

Come the parties, and the plaintiff [defendant] moves the court for a venire de novo, as follows: [*here insert*], [*or, if verbal, say, on the fol-*

lowing grounds: (*state them*)], which motion is sustained [overruled], to which the defendant [plaintiff] excepts.

See VENIRE DE NOVO, vol. 1, §§ 970-975; vol. 3, p. 438.

990.—Motion in arrest of judgment.

— }
v. } Motion in Arrest of Judgment Sustained [Overruled].
— }

Come the parties, and the plaintiff [defendant] moves in arrest of judgment herein, as follows: [*here insert*], [*or, on the following grounds (state them)*], which motion is submitted to the court and sustained [overruled], to which the defendant [plaintiff] excepts.

6. IN PROCEEDINGS ON APPEALS.

See APPEALS, pp. 483, 485.

991.—Motion to dismiss appeal from justice of the peace.

— }
v. } Motion to Dismiss Appeal Sustained [Overruled].
— }

Come the parties, and the plaintiff [defendant] moves the court to dismiss the appeal herein on the following grounds: [*state them*], which motion is submitted to the court and sustained [overruled], to which the defendant [plaintiff] excepts. [And it is ordered that this appeal be and it hereby is dismissed at the cost of the plaintiff (defendant).]

992.—Order allowing appeal after thirty days.

— }
v. } Appeal after Thirty Days Allowed.
— }

Come the parties, and the defendant moves the court for an order authorizing an appeal from the judgment rendered against him in favor of the plaintiff by —, a justice of the peace of — township, and it appearing to the satisfaction of the court from the affidavit of the defendant that he was [not] prevented from taking an appeal from said judgment within the time required by law by circumstances over which he had no control, said motion is sustained [overruled], and it is ordered that an appeal be [not] granted [upon his filing an appeal bond as provided by law].

See ante, vol. 2, §§ 1129-1132.

993.—Rule on justice to send up papers.

— }
 v. } Rule agianst Justice to Send Up Papers.
 — }

Come the parties, and it appearing to the court that an appeal has been regularly taken in this cause from —, a justice of the peace of — township, and that said justice has not sent up the transcript and papers as required by law.

Now, therefore, it is ordered that said justice do make out and transmit to the clerk of this court a duly certified transcript of the proceedings and judgment in this cause before him, and the original papers on file in his office without delay.

994.—Time given in which to file bill of exceptions.

— }
 v. } Time Given to File Bill of Exceptions.
 — }

Come the parties, and — days' time [until the — day of —, 18—] is given the plaintiff [defendant] in which to prepare and file his bill of exceptions herein.

1. The record must show the giving of time. Ante, vol. 2, § 1076; vol. 3, p. 490.

995.—Filing bill of exceptions.

— }
 v. } Bill of exceptions Filed.
 — }

Come the parties, and the plaintiff [defendant] files his bill of exceptions, as follows: [*here insert*].

7. ADJOURNMENTS OF COURT—SPECIAL AND ADJOURNED TERMS.

996.—Order for an adjourned term.

Whereas, the present — term of this court will expire by statutory limitation on the — day of —, 18—, leaving business pending and undisposed of for want of time; it is ordered that an adjourned term of this court be held, commencing on the — day of —, 18—, for the transaction and disposition of such business as may at that time be pending and undisposed of, and that said adjourned term continue as part of this regular term; and further, that notice of the holding

of said adjourned term be given by publication in the —, a newspaper of general circulation published at —, for —.

1. What record must show. R. S. 1881, § 1332; *Casily v. The State*, 32 Ind. 62; *Harper v. The State*, 42 Ind. 405; *Washer v. The Allensville, etc.*, Tp. Co., 81 Ind. 78.

2. Notice, how given. Notice should be given by publication in a newspaper of general circulation published in the county. Acts, 1877, p. 28, § 1; *Washer v. The Allensville, etc.*, Tp. Co., 81 Ind. 78.

It is held that section 1333 of the Revised Statutes of 1881, which provides for the giving of notice in some manner to be specified by the court, is repealed. *Washer v. The Allensville, etc.*, Tp. Co., 81 Ind. 78.

997.—Order appointing attorney to preside.

State of Indiana, County of —.

I, —, judge of the Judicial Circuit of said state, and ex-officio judge of the — Circuit Court, being unable, on account of —, to preside at the — term, 18—, of said court, hereby designate and appoint —, an attorney of said court, to preside and hold said court.
—, Judge.

998.—Oath of attorney indorsed on appointment.

State of Indiana, — County.

I, —, being duly sworn, say that I will support the constitution of the United States and the constitution of the State of Indiana, and that I will faithfully and honestly discharge the duties of presiding judge *pro tempore* of the — Circuit Court, under the within appointment, to the best of my skill and ability, so help me God.

[*Jurat.*]

[*Signature.*]

999.—Order appointing attorney to hold special term.

State of Indiana, — County.

Being disqualified to sit as judge of the — Circuit Court in the causes pending therein, numbered and entitled as follows: [*set out the numbers and titles of the cases*], I do hereby designate and appoint —, a reputable and qualified attorney of the — Circuit Court, to preside at the trial of said causes, and hereby designate and fix Monday, the — day of —, 18—, as the beginning of a special term, to which said causes are hereby assigned.

—, Judge of the — Circuit Court.

Dated at —, this — day of —, 18—.

1000.—Placita before attorney acting as judge.

Pleas before —, an attorney of the — Circuit Court, duly appointed and qualified to sit as presiding judge of the — Circuit Court at its — term, 1883.

34. PARTITION.

See COMPLAINT, p. 258; ANSWER, p. 387; JUDGMENTS, p. 463-466.

1001.—Report of commissioners making partition of the real estate.

[Caption.]

We, the undersigned, commissioners appointed to make partition of the real estate hereinafter described, respectfully report that, in obedience to the warrant issued by the clerk of this court, which is attached hereto and made a part of this report, we have made partition of the real estate described in said warrant, to wit, [*describe it*], as follows:

To the plaintiff, —: [*describe the part set off specifically by metes and bounds.*]

To the defendant, —: [*describe as above.*]

[*Set out the name of each party and the interest set off to him.*]

In witness whereof, we hereunto set our hands, this — day of —, 18—. [Signatures.]

1002.—Report that property can not be divided without injury.

[Caption.]

We, the undersigned, commissioners appointed to make partition of the real estate described in the warrant issued to us, which is attached hereto and made a part hereof, respectfully report that we have carefully examined the premises described in said warrant, and that the same can not be divided without injury to the owners.

In witness whereof, we have hereunto set our hands, this — day of —, 18—. [Signatures.]

For confirmation of report and order of sale, see JUDGMENTS, pp. 464, 465.

1003.—Report of sale.

[Caption.]

The undersigned, commissioner appointed to make sale of the real estate for the partition of which this action is brought, respectfully re-

ports to the court that, in pursuance of the order of the court, he caused said real estate to be appraised by — and —, two disinterested householders of said county, whose appraisement is attached hereto and made a part of this report. That he caused notice of the time and place of said sale to be given by [*state how, as required by the order of sale*].

That, on the — day of —, 18—, that being the time fixed for said sale, he proceeded to offer the same for sale at public auction at [*state the place, as fixed by the order of sale*], and — bidding therefor the sum of — dollars, and that being the highest and best bid, he openly knocked off and sold the same to him for said sum of — dollars.

That said purchaser paid him in hand [*the amount required by the order to be paid*], and executed to him [*the security required for the deferred payments, payable when required*], and he issued to him a certificate of purchase for said real estate, entitling him to a deed therefor upon the payment of the purchase-money in full. Wherefore he asks that said sale be confirmed.

—, Commissioner.

See ante, vol. 2, § 1463.

1004.—Exceptions to report.

[*Caption.*]

The plaintiffs [defendants] [—, one of the plaintiffs (defendants)] in the above entitled cause hereby except to the report of the commissioners appointed to make partition herein [the commissioner appointed to make sale of the real estate herein], on the following grounds: [*state the grounds of objection specifically.*]

Wherefore they ask that said report and the partition [sale] made by said commissioner[s] be set aside.

[*Signatures.*]

1005.—Report of final payment of purchase-money.

[*Caption.*]

The undersigned, commissioner to make sale of the real estate sought to be partitioned herein, respectfully reports that the purchaser of said real estate has paid the purchase-money in full. That he has received of said purchase-money in all the sum of — dollars. That he has paid the same out on costs and to the parties entitled to receive the same, as follows: [*show fully the proper application of the moneys received.*] He submits herewith a deed to said purchaser.

Wherefore he asks that this report be approved, that he be ordered to execute the said deed to said purchaser, and that, upon executing said deed, that he be fully and finally discharged.

[*Signature.*]

1006.—Order approving report and deed, directing the execution of the deed, and discharging commissioner.

— } Report of Commissioner Approved—Deed Ordered—Com-
 v. } missioner Discharged.

Come the parties, and the commissioner appointed to make sale of the real estate herein also comes and makes his report of the payment of the purchase-money therefor, as follows: [*here insert*], and submits therewith a deed to be executed to the purchaser for the approval of the court. And the court having seen and examined said report and deed, approves the same, and orders that said commissioner execute said deed to the purchaser.

And said commissioner now executes said deed, and the same is approved by the court, and said commissioner is discharged.

1. When purchaser entitled to possession of land. Deputy *v.* Mooney, 97 Ind. 463.

1007.—Commissioner's deed.

Know all men by these presents, That, whereas, at the — term, 18—, of the — Circuit Court, in an action then pending therein, wherein — was plaintiff and — defendant, for the partition of the real estate hereinafter described [*or, of which the lands hereinafter described is a part*], it was, by an order of said court, recorded in order book —, p. —, of said court, adjudged that said lands were not susceptible of partition without injury to the owners, and that the same should be sold at public [*private*] sale; and the undersigned, —, was appointed a commissioner to sell the same.

And whereas, on the — day of —, 18—, said real estate was, in conformity to said order, sold by said commissioner to — for the sum of — dollars.

And whereas, said sale was by said commissioner reported to said court, and by an order of said court, entered on order book —, page —, duly confirmed.

And whereas, at the — term, 18—, of said court, said commissioner reported that said — had paid said purchase-money in full, and said court, by an order entered at page — of order book —, directed said commissioner to convey said real estate to said — by deed.

Now, therefore, in pursuance of said orders, and in consideration of said sum of — dollars, I, the said —, commissioner as aforesaid,

hereby convey and confirm to said —, his heirs and assigns, said real estate, to wit: [*describe it particularly*], and all the interest of said parties to said suit therein, as fully as I may convey the same by the authority aforesaid.

Witness my hand and seal, this — day of —, 18—.

—, Commissioner. [SEAL.]

Approved in open court, this — day of —, 18—.

—, Judge.

[*Attach acknowledgment as to other deeds.*]

1008.—Bond of commissioner to sell.

Know all men by these presents, That we, — and —, are held and firmly bound unto the State of Indiana in the penal sum of — dollars, for the payment of which we bind ourselves, our heirs and assigns, jointly by these presents.

The consideration of the above obligation is such, that whereas, the above bound — has been by the — Circuit Court duly appointed a commissioner to sell real estate in an action now pending in said court, wherein — is plaintiff and — defendant.

Now, therefore, if the said — shall faithfully and honestly discharge his duties as such commissioner, and account for and pay over all moneys that may come to his hands as such, then this obligation to be void, else in full force.

Witness our hands and seals, this — day of —, 18—.

—, [SEAL.]

—, [SEAL.]

Approved in open court, this — day of —, 18—.

—, Judge.

For complaint on bond, see ante, p. 100.

For the practice generally in partition proceedings, see vol. 1, §§ 138, 139, 157–159, 179, 961; vol. 2, §§ 1456–1466.

35. PRINCIPAL AND SURETY.

See COMPLAINT, pp. 265–267; ANSWER, pp. 391–394; JUDGMENTS, p. 466.

1009.—Notice of surety requiring suit against principal.

To —:

I hereby notify you forthwith to institute an action on the note held by you, given by — to —, for — dollars, bearing date the —

day of —, 18—, and payable — months after date, the said — being the principal on said note, and myself the surety.

Dated this — day of —, 18—.

[Signature.]

1. What notice necessary, and its effect. Ante, vol. 1, § 608; vol. 2, §§ 1470, 1471; vol. 3, p. 392.

36. PROTEST.

1010.—General form.

United States of America, State of Indiana.

By this public instrument of protest be it known, that on the — day of —, 18—, I, —, a notary public for the county of —, State of Indiana, by lawful authority duly commissioned and sworn, living in said county and state, in the county and state aforesaid, at the request of —, holder of the original draft [bill of exchange], [promissory note], [check], hereunto attached, at the close of banking hours, presented the same to [*the payer at the place of payment, e. g.,*] the payer at the First National Bank of Vevay, Indiana [*or, to —, at his usual place of business*], and demanded payment [acceptance] thereof, which was refused. I then protested the same for non-payment [non-acceptance], and notified the drawer and indorsers thereof by a separate notice to each, inclosed under cover and addressed to [*state whom*], at [*state where*], and deposited the same in the post-office at —, postage paid, and by notice to —, No. — — street, in the city of —, State of Indiana, and delivered personally the same day. Whereupon, I, the said notary, upon the authority aforesaid, have protested and do hereby solemnly protest, as well against the drawer of the said draft [bill of exchange], [check], [maker of said promissory note], as against all other persons whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interests suffered for want of payment [non-acceptance] thereof.

Thus done and protested at —, —, the day and year above written. And I certify that I have no interest in the above protested instrument.

In testimony whereof, I grant these presents under my signature, and the impress of my notarial seal of office.

[SEAL.]

—, Notary Public.

1011.—Notice of protest.

State of Indiana, — County, ss. — —, 18—.

Take notice, that a — for — dollars, dated the — day of —, 18—, drawn by —, in favor of —, on —, accepted by —, indorsed by —, payable — months [days] after date [sight], at —, was this day presented for payment [acceptance], which was refused, and therefore was this day protested, by the undersigned, notary public for the county of —, State of Indiana.

The holder[s] therefore look[s] to you for payment thereof, together with interest, damages, costs, etc., you being — thereof.

To — —. —, Notary Public.

37. RECEIVERS.

1012.—Notice of application for the appointment of a receiver.

State of Indiana, County of —.

In the — Circuit Court.

— }
v. } Notice of Application for the Appointment of a Receiver.

The defendant [plaintiff] in the above entitled cause is hereby notified that, on the — day of —, 18—, at — o'clock — M., or as soon thereafter as counsel can be heard, the plaintiff [defendant] will, at the court-house [the judge's chambers], in the city of —, make application for the appointment of a receiver in said cause, to take charge of and sell the property in controversy therein [*or state for what purpose a receiver is to be asked for.*] —, Attorney for —.

Dated this — day of —, 18—.

1. Notice, when necessary. R. S. 1881, § 1230; ante, vol. 2, § 1484; *Pressley v. Lamb*, 4 N. E. Rep. 682; *First Nat. Bank of Mauch Chunk v. U. S. Encaustic Tile Co.*, 4 N. E. Rep. 846.

1013.—Order appointing receiver.

— }
v. } Appointment of Receiver.

Comes the plaintiff, and makes application for the appointment of a receiver to [*state what*], and it appearing that the defendant has been duly notified of the time and place of making said application [*or show defendant's appearance.*]

And the plaintiff, in support of his said application, submits the affidavits of — and —, and the defendant, in opposition thereto, submits the affidavits of — and —.

And the court, having seen and examined said affidavits, orders that a receiver be appointed as prayed for, and that — be and he hereby is appointed such receiver.

It is further ordered that he execute his undertaking to — in the penal sum of — dollars, for the faithful performance of his duties as such receiver.

1. Who may appoint receivers. Ante, vol. 2, § 1481; *Pressley v. Lamb*, 4 N. E. Rep. 682.

2. In what cases may be appointed, and when. Ante, vol. 2, § 1483; vol. 3, pp. 274, 275; *First Nat. Bank of Mauch Chunk v. U. S. Encaustic Tile Co.*, 4 N. E. Rep. 846; *Brinkman v. Ritzinger*, 82 Ind. 358; *Pressley v. Lamb*, 4 N. E. Rep. 682, 695.

1014.—Receivers' undertaking.

[Caption.]

We undertake to — that —, who has been appointed receiver in the above-entitled cause, will faithfully discharge his duties as such receiver, and obey the orders of the court or judge therein made.

[Signatures.]

Approved this — day of —, 18—.

—, Judge.

1015.—Notice of motion to remove receiver.

[Caption.]

The plaintiff, —, and —, the receiver in the above-entitled cause, are hereby notified that on the — day of —, 18—, at — o'clock — M., or as soon thereafter as counsel can be heard, the defendant will, at the court-house at —, move the court to remove said — from his position as receiver therein.

—, Attorney for Defendant.

Dated this — day of —, 18—.

1016.—Order for receiver to bring suit.

— }
v. } Order for Receiver to bring Suit.
— }

It appearing to the court that —, the receiver herein, is indebted to the — in this case in the sum of — dollars [or show some other right of action], the court, on the application of said receiver, authorizes and directs him to bring an action against the said — for the

recovery of said — dollars, with the interest thereon [*or state other object of the suit*].

1. Order necessary to entitle receiver to sue. Ante, vol. 2, § 1486; vol. 3, p. 274.

1017.—Order allowing action against receiver.

— }
v. } Order allowing — to bring Suit against Receiver.

Comes — and moves the court for leave to bring an action against the receiver heretofore appointed by this court in this cause. On consideration whereof the court grant the same and allows the said — to file his complaint forthwith.

1. Receiver can not be sued without leave of court. Ante, pp. 274, 275.

1018.—Order to sheriff to withdraw levy.

— }
v. } Order to Sheriff to withdraw Levy.

It appearing that the sheriff of this county has made a levy upon certain property in the hands of the receiver in this action without leave of the court, it is on motion ordered that he withdraw the same forthwith.

It is further ordered that the said sheriff appear before this court on the — day of —, 18—, and show cause why an attachment should not issue against him as for a contempt of court in making said levy.

1. Property in hands of receiver can not be levied upon. Knobe v. Baldrige, 73 Ind. 54.

1019.—Order confirming report.

— }
v. } Report of Receiver Confirmed.

This cause coming on to be heard upon the motion to confirm the final report of the receiver herein, it is ordered, on motion of said receiver, that he be allowed and paid the sum of — dollars, out of the moneys in his hands, in full for his services herein. And the court finding said report correct, and that the said receiver has fully obeyed the orders of the court to him issued, and has duly paid over all moneys coming into his hands as such receiver:

It is therefore ordered that all acts and things done by him, as well

as his said report, be and they hereby are approved and confirmed, and the said — is discharged from his duties, liabilities, and responsibilities as such receiver, and his undertaking therefor is vacated and canceled.

For the practice generally in applications for the appointment of receivers, see ante, vol. 255, §§ 1479-1488; vol. 3, pp. 274, 275.

38. REDEMPTION.

1020.—Affidavit of judgment creditor in support of application to redeem.

State of Indiana, — County, ss.

—, being duly sworn, says that on the — day of —, 18—, he recovered a judgment against —, in the — Circuit Court of the State of Indiana, for the sum of — dollars and — dollars costs, in an action wherein — was plaintiff and — defendant, and that there is now due and unpaid thereon the sum of — dollars of principal and interest and — dollars costs.

That said judgment is recorded in Order Book —, page —, of said court.

That said judgment is a lien on the following described real estate in the county of —, State of Indiana: [*describe it*], which was sold by the sheriff of — county for — dollars on the — day of —, 18—, on an execution, in favor of —, issued upon a judgment recovered by said —, in the — court, on the — day of —, 18—, wherein — was plaintiff and — defendant, which judgment was a senior lien to that of this affiant.

That said — [*the owner*] has not redeemed said real estate or any part of it, and this affiant now makes application to redeem the same [to redeem the following part thereof: (*describe it*)], which was sold at said sale for the sum of — dollars, and now tenders for the purpose of said redemption the sum of — dollars.

[*Jurat.*]

[*Signature.*]

1. What necessary to redemption by judgment creditor. R. S. 1881, §§ 768, 771, 772; ante, vol. 2, § 1192.

39. REFEREES.

1021.—Written consent to reference.

State of Indiana, County of —, —
In the — Circuit Court, — Term, 18—.

— }
v. } Consent to Refer Cause to — as Referee.
— }

We, the parties to the above-entitled cause, hereby consent that all of the issues therein [*or, if only a part of the issues are to be referred, designate them*], to — as referee [*or, to a referee to be appointed by the court*], to hear and determine the same and report to this court.

Dated this — day of —, 18—. [Signatures.]

1. **Must be written consent.** R. S. 1881, § 556, ante, vol. 1, § 814; *Stanton v. The State*, 82 Ind. 463.

1022.—Order of reference.

— }
v. } Cause Referred to —.
— }

Come the parties and file in open court their written consent that this cause be referred to —, as a referee [*to referees*], to hear and determine the same [*to hear and determine the following issues: designate them*].

It is therefore ordered by the court that this cause [*or, said issues in this cause*] be and they hereby are referred to — [*or, if referee is not agreed upon, name the one appointed by the court*], who is hereby appointed as a referee herein to hear and determine the same and report to this court [*on the — day of the next term thereof*].

1. For the practice in case of trial by referees, see ante, vol. 1, §§ 814–820; *Stanton v. The State*, 82 Ind. 463; *Beard v. Hand*, 88 Ind. 183; *Lee v. The State*, 88 Ind. 256; *Roush v. Emerick*, 80 Ind. 551.

2. **Reference to master commissioner.** Ante, vol. 1, § 821; *Stanton v. The State*, 82 Ind. 463; *McNaught v. McAlister*, 93 Ind. 114; *Borchus v. The Huntington Building and L. Ass'n*, 97 Ind. 180.

3. **Trial, how conducted before referee.** It will be seen by the authorities cited above that the trial is conducted as if pending before the court. Special findings and conclusions may be required. Ante, vol. 1, §§ 816–818.

Exceptions are taken as upon a trial by the court. Ante, vol. 1, § 818.

And if the finding is general, it is treated as the verdict of a jury, and is liable to the same objections. If special findings and conclusions are filed, they must be treated as if filed by the court. Ante, vol. 1, §§ 817, 819.

Therefore the forms of proceedings are essentially the same as upon a trial by the court.

40. REPLEVIN.

See COMPLAINT, p. 277; ANSWER, p. 397; VERDICTS, p. 430; JUDGMENTS, p. 470.

1023.—Order for seizure and delivery.

— } In the — Circuit Court of the State of Indiana, —
 v. } Term, 18—
 — }

The State of Indiana to the Sheriff of — County:

You are commanded to take the following property [*describe it as in the complaint, giving its value*] from the defendant, and that you deliver the same to the defendant upon his giving the undertaking and surety required by law within twenty-four hours, and upon his failure to give such undertaking, that you deliver the property to the plaintiff, upon his giving the undertaking and surety as required by law within the next twenty-four hours, and upon his failure to give such undertaking that you return the same to the defendant. And make due return of your doings on this order forthwith.

Witness my hand, and the seal of said court hereunto affixed, this — day of —, 18—.

* [SEAL.]

—, Clerk.

1. What order must contain. R. S. 1881, § 1269; ante, vol. 2, § 1500.

1024.—Defendant's delivery bond.

[Caption.]

We undertake to the plaintiff that the defendant will safely keep the property taken on the order of replevin in this action, and not allow the same to be in any way injured or damaged, and will deliver the same to the plaintiff if judgment shall be rendered to that effect, and will also pay the plaintiff all such sums of money as he may recover in this action.

In witness whereof, we have hereunto set our hands and seals, this — day of —, 18—.

— [L. S.]

— [L. S.]

Approved by me, this — day of —, 18—.

—, Sheriff — County.

1. What bond must contain. R. S. 1881, § 1270; ante, vol. 2, § 1502; vol. 3, p. 117.

1025.—Plaintiff's undertaking.

[Caption.]

We undertake to the defendant that the plaintiff will prosecute this action with effect, and without delay, and that he will return the property to the defendant if return be adjudged by the court, and that he will pay to the defendant all such sums of money as may be recovered against him by the defendant in this action for any cause whatever.

Witness our hands and seals, this — day of —, 18—.

— [L. s.]

— [L. s.]

Approved by me, this — day of —, 18—.

—, Sheriff — County.

1. What bond must contain. R. S. 1881, §§ 1270, 1547; ante, vol. 2, § 1502; *Fawcner v. Baden*, 89 Ind. 587; ante, p. 116.

41. REPLEVIN BAIL.

1026.—Undertaking.

I, —, hereby acknowledge myself replevin bail for the defendant for the payment of the foregoing judgment, interest and costs, accrued and to accrue thereon, at or before the expiration of the term of the stay of execution on said judgment.

[Signature.]

—, 18—.

Taken and approved by me, this — day of —, 18—.

—, Clerk — Circuit Court.

1. How entered, and what must contain. R. S. 1881, §§ 690, 691; ante, vol. 1, §§ 1040, 1043; *Baker v. Merriam*, 97 Ind. 539.

2. Effect and construction of contract of replevin bail. Ante, vol. 1, §§ 1040, 1043; *Baker v. Merriam*, 97 Ind. 539; *Jones v. Swift*, 94 Ind. 516.

3. Discharge from may be had on motion, when. *Eberwine v. The State*, 79 Ind. 266.

See SUBROGATION, p. 307, note; PRINCIPAL AND SURETY, p. 265.

1027.—Replevin bail indorsed on execution.

We acknowledge ourselves replevin bail for the defendants for the payment of the judgment upon which the within execution has issued, together with the interest and costs, accrued and to accrue thereon, at

or before the expiration of the term of the stay of execution on said judgment. [Signatures.]

— —, 18—.

Taken and approved by me, this — day of —, 18—. —, Sheriff of — County.

1. May be indorsed on execution. Ante, vol. 1, § 1043.

2. Bail for several defendants—Reversal as to one releases bail. Baker v. Merriam, 97 Ind. 539.

1028.—Oath of replevin bail.

[Caption.]

State of Indiana, — County.

Personally appeared before me, —, clerk of the — Circuit Court within and for said county, and makes application to become replevin bail for the stay of execution against the defendant in the above entitled cause, and being by me first duly sworn on oath, says that he is worth — dollars over and above all of his indebtedness, as he verily believes. [Signature.]

Subscribed and sworn to before me, this — day of —, 18—. —, Clerk.

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